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In The Supreme Court of the United States

PATRICIA B. BURNS,

Petitioner,

v.

UNINET, INCORPORATED, and SOUTHEASTERN COMPUTER CONSULTANTS, INC.,

Respondents.

ON PETITION FOR *WRIT* OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR *WRIT* OF *CERTIORARI* and APPENDIX (VOLUME I OF II)

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QUESTIONS PRESENTED

I. DOES THE CLEARLY ERRONEOUS STANDARD OF REVIEW APPLICABLE TO A JUDGMENT GRANTED PURSUANT TO FED. R. CIV. P. 52 REQUIRE THE COURT OF APPEALS TO REVERSE A DISTRICT COURT JUDGMENT BASED IN PART UPON FACTS NOT PRESENTED AT TRIAL?

II. IS A JUDGMENT BASED IN PART UPON FACTS NOT PRESENTED AT TRIAL A DENIAL OF DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

III. UNDER TITLE VII OF THE CIVIL RIGHTS ACTS OF 1964, U.S.C. § 2000 (e-3) AS AMENDED BY THE CIVIL RIGHTS ACT OF 1991 IS DIRECT EVIDENCE OF DISCRIMINATORY INTENT REQUIRED TO AVOID JUDGMENT AS A MATTER OF LAW FOR THE EMPLOYER?

IV. DOES FED. R. CIV. P. 39(b) REQUIRE A DISTRICT JUDGE TO CONSIDER FACTORS OTHER THAN THE VIOLATION OF FED. R. CIV. P. 38 WHEN CONSIDERING A MOTION FOR JURY TRIAL PURSUANT TO FED. R. CIV. P. 39(b)?

PARTIES TO THE PROCEEDING

The petitioner is Patricia B. Burns who is an individual residing at 694 Republican Street, Paris, Virginia 20130.

The respondents are UniNet, Inc. ("UniNet") and Southeastern Computer Consultants, Inc. ("SCCI"), Virginia Corporations with registered agents in Fredericksburg, Virginia and offices in Frederick, Maryland, Herndon and Virginia and doing business in the Commonwealth of Virginia, the State of Maryland and the District of Columbia. John Bjorn was named as a defendant in the complaint, but dismissed by order of the District Court which was not appealed.

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Patricia B. Burns, by counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 18a)[1] is unreported. The opinion of the district court (App. 2a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 5, 2000. A petition for rehearing was denied on May 2, 2000. (App. 33a). This Petition for Writ of Certiorari is filed within ninety (90) days from that date. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] "App." refers to the appendix included with this petition and the separately-bound appendix to this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. Amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FED. R. CIV. P. 38. Jury Trial of Right states in pertinent part:

> (a) *Right Preserved.* - The right of trial by jury as declared by the Seventh Amendment of the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.
>
> (b) *Demand.* - Any party may demand a trial by jury of any issue triable or right by a jury by (1) serving upon the other parties a demand therefor

in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.

(d) *Waiver*. - The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

FED. R. CIV. P. 39(b). Trial by Jury or by the Court.

(b) *By the Court*. - Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

FED. R. CIV. P. 52. Findings by the Court; Judgment on Partial Findings.

(a) *Effect*. - In all actions tried upon the facts

without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

(b) *Amendment*. - On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings - or make additional

findings - and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

(c) *Judgment on Partial Findings*. - If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

STATEMENT

Patricia B. Burns ("Burns") filed this action in the United States District Court for the Eastern District of Virginia against respondents UniNet and SCCI, *enter alia*, on grounds that she was discriminated against by respondents on account of her sex which adversely affected her employment conditions and that her employment was terminated in retaliation for having filed a complaint of sexual harassment with the Equal Employment Opportunity Commission ("EEOC"). The District Court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1367 (a) and 42 U.S.C. § 2000 (e) (5) (f). The United States Court of Appeals for the Fourth Circuit had appellate jurisdiction to review the final decision of the District Court pursuant to 28 U.S.C. §§ 31 and 1291.

A. Course of Proceedings. Burns filed her complaint on March 19, 1998. On May 11, 1998, a scheduling order was entered by the district court setting a pretrial conference for September 17, 1998. At the pretrial conference petitioner discovered that the request for a jury trial had been omitted from the complaint. On September 21, 1998, petitioner filed a motion for a jury trial. On October 30, 1998, the motion for a jury trial was denied as were respondents' motion for summary judgment on Counts I, II and IV. The trial occurred on December 10, 1998. At the conclusion of petitioner's case, the district court granted respondents' motion for judgment pursuant to FED. R. CIV. P. 52.

The judgment of the district court is based, inter alia, upon fifteen specific findings of fact which are entirely without basis in

evidence presented at trial either direct or by inference but have their genesis in respondent's Proposed Conclusions of Law and Findings and Fact copied verbatim into the district court opinion.[2] Forty-six of the forty-eight paragraphs which comprise the memorandum opinion of the district court were copied verbatim or nearly verbatim from the proposed findings of fact and conclusions of law filed by respondents in advance of the trial. App. 35a.[3]

In her briefs in the court of appeals, Burns set forth the findings of fact which were not supported by the evidence. In its opinion denying Burns' appeal, the Fourth Circuit declined to specifically address any of the factual discrepancies or the impact of the absence of support for those factual findings.

In affirming the denial of a motion for a jury trial pursuant to FED. R. CIV. P. 39(b) based upon a failure to comply with FED. R. CIV. P. 38 the Fourth Circuit considered only Burns' counsel's admission of fault in failing to make a timely request for a jury trial. App. 32a.

B. Burns' Evidence of Sexual Discrimination, Retaliation and the District Court's Findings of Fact. Burns presented

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[2] Identified herein by bold print with citations to the record. The first reference following bold print is to the district court opinion and the second to the appendix page and paragraph number of respondent's pleading.

[3] There exist additional findings of fact in the district court opinion which are unsupported by trial evidence. Only those most unfavorable to Burns are cited.

evidence that John Bjorn ("Bjorn"), President of UniNet, engaged in a pattern of behavior expressly directed at women for the purpose of pursuing a romantic relationship. The pattern consisted of a period of extremely solicitous personal attentiveness toward the object women, including privileges and professional favors. After a time, if no romantic response occurred, the solicitousness, privilege and assistance were withdrawn and replaced with a course of retaliatory behavior designed to adversely affect the women's work performance and ultimately drive them from the company. The pattern was proven with Maureen Kearns ("Kearns"), Sue Foreman Temple ("Temple") and Burns. The evidence further revealed that Bjorn engaged in a personal relationship with a fourth female employee at the time of Burns' termination in 1995. With regard to each of the target women who testified, the district court made certain factual findings purportedly based upon the testimony but in fact precisely opposite to it.

On November 23, 1994, Burns notified management of UniNet and SCCI by memorandum that she was the victim of discrimination perpetrated by Bjorn. On November 28, 1994, she filed a complaint of sex discrimination with the U.S. Equal Employment Opportunity Commission (EEOC). On March 9, 1995, her employment was terminated without just cause.

C. The Record. UniNet is a company in the business of supplying computer hardware, software, communications and training to customers. Plaintiff's Exhibit, hereinafter "PE" 108[4]

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[4] Certain exhibits have been lodged with the Clerk of the Court.

Final authority to determine employee salary increases, terminations and various other financial and administrative functions of UniNet, Inc. is vested in the President of SCCI. PE 108. Burns was initially hired by UniNet in December of 1990 by Bjorn and resigned in late 1992. App. 276a, 302a.

During the first employment period, Burns' manager was Todd Heidelberger ("Heidelberger"). App. 276a. Although Heidelberger was her manager, Bjorn accompanied her on almost all of her sales calls during her first year. App. 276a, 277a. While on sales calls, Bjorn routinely advised prospective customers that UniNet was owned by SCCI. App. 280a. It seemed to Burns that Bjorn had taken a liking to her. He "hung around" her desk. He talked to her about problems in his marriage and asked her out for drinks on numerous occasions. Bjorn did not provide the same kind of assistance to others which he provided to Burns and she became concerned that he had other motives. App. 281a. Contrary to the testimony of Burns and Kearns, the district court found that **"Bjorn, with respect to Burns' training, provided sales assistance, evaluated her performance, and treated her the same as other sales representatives**." App. 3a, 38a ¶ 12.

Bjorn asked Burns out for drinks on so many occasions that finally she consented to go on the assumption that others from the company would be present. App. 285a-286a. When Burns arrived at the restaurant, no others from UniNet were present but nevertheless she sat at the bar with Bjorn and had a few drinks. Burns attempted to keep the conversation on matters related to sales techniques and leads; however, Bjorn continually moved the discussion to personal matters. App. 286a. They stayed for about

an hour. Bjorn left Burns briefly to speak with an acquaintance and returned advising Burns that the acquaintance thought Burns was having an affair with Bjorn and that he thought it was "funny". Burns disagreed. Burns advised him that she was forty years old and Bjorn who was twenty-nine expressed surprise. Burns terminated the meeting by advising Bjorn that she was leaving to return home to her daughter. App. 287a-289a.

Thereafter, the solicitous behavior and flirtations of Bjorn stopped. App. 289a. Not only did the flirtations stop, but Bjorn refused to respond to Burns' sales needs. App. 290a. In addition to the withdrawal of sales assistance, Bjorn began to belittle Burns and berate her about her job performance in front of others. App. 292a. Bjorn's continued unjustified ill treatment of Burns increased to the point that it seemed that he was stalking her to cause her upset. App. 295a. She reported the events to Heidelberger advising him that she felt that she was being harassed; that the treatment was unacceptable and requesting that he do something about it. App. 297a. When asked whether the harassment was "sexual harassment", Burns advised that she didn't know what kind of harassment it was, but that it was harassment and she wanted it stopped. App. 298a. **The district court's finding that Burns expressly denied that the harassment was sexual, stating, "no, more emotional harassment" is not within the evidence presented.** App . 4a, 39a ¶ 20.

Heidelberger arranged a meeting with Bjorn who agreed that the accusations were serious, but advised Burns that the problems were hers. App. 299a, 300a. **The district court's finding that, "Heidelberger reported to Bjorn that Burns was complaining**

about company policies" is not within the evidence presented at trial. App. 4a, 39a ¶ 18. In late 1992, Burns' customers were falling off and she received constant complaints that customer orders were not being filled on time. Burns stated she could not make it at the company without the cooperation of Bjorn; could not take the humiliation, and therefore was forced to quit. App. 302a-303a.

Heidelberger confirmed that Burns was a great employee; that she brought in business; showed up on time; was responsible and followed directions. Burns advised him that Bjorn had been emotionally harassing her. App. 139a. She was upset and shaking when she described the harassment to him. Burns advised Heidelberger in 1992 that she quit UniNet because she was uncomfortable with Bjorn. App. 140a. **Contrary to Heidelberger's testimony and absent from the evidence presented the district court found as a matter of fact: "During the later part of Burns first period of employment, she began failing or refusing to make cold calls to increase UniNet's customer base. She also failed and/or inadequately untimely prepared returned merchandise authorization forms ("RMAs") to document returned equipment for credit, causing UniNet to lose money. Bjorn criticized and counseled Burns and others for these acts. Burns, however, did not adhere to Bjorn's directions."** App. 3a, 38a ¶ 16.

While working for a temporary agency in October of 1990, Kearns was assigned to UniNet when Bjorn solicited her to work full-time as a receptionist with some bookkeeping duties. App. 177a-178a. Kearns accepted and commenced employment at the

end of November of 1990. She described Bjorn as being very friendly toward her. He spent a lot of time in front of her desk talking to her, flirting with her and paying more attention to her than any other women in the office. App. 173a-175a. **Contrary to this testimony and absent from the evidence presented the district court found as a matter of fact that Kearns initiated personal conversations with Bjorn and that Bjorn did not spend a disproportionate amount of time around her.** App. 6a, 42a ¶ 33. Bjorn talked to her about drinking stories, and appeared to be trying to bond with her since she had recently graduated from college. Bjorn asked her to accompany him for drinks after work, but she declined. App. 171a. Whenever Kearns asked to leave the office early Bjorn always consented. She eventually stopped asking because she thought there was more to his being friendly and did not want to give him the impression that she was at all interested in him. App. 176a.

After Burns commenced her employment, Kearns noted that Bjorn shifted his attention to Burns. Bjorn acted in exactly a similar manner toward Burns that he had formerly acted toward her. He stood in front of Burns' desk and flirted with her and did all of the things that he had formerly done with Kearns. Kearns was relieved because the pressure was then off of her. App. 176a-177a. In January of 1991 when Kearns brought to Bjorn's attention expense reports of an employee which she considered to be improper, Bjorn became upset with her, threw papers at her and uttered an expletive to her. App. 177a-180a. Kearns advised Bjorn that she couldn't tolerate such treatment and requested a new position. Kearns also noted that Bjorn's attitude towards

Burns was changing. She heard Bjorn yell at Burns and considered his treatment of her to be completely unprofessional. App. 181a. Kearns was transferred to hardware sales and two days later to sales of maintenance contracts, a more difficult position than other positions within the company. App. 180a. After being transferred to maintenance sales, Bjorn provided no assistance to her; whereas, he had provided extraordinary assistance to her while in the position of receptionist. When Temple was hired, Kearns observed that the focus of Bjorn's attention was then shifted from Burns to Temple as it had been shifted from her to Burns.

Temple was hired by Bjorn in 1992. She received her training as a sales representative from Bjorn. App. 196a. Unlike Burns and Kearns, Temple attended after hours social functions with employees of UniNet including Bjorn. App. 197a. Upon her departure from a "happy hour" attended by several people from UniNet, Temple was at her car when Bjorn pulled up to her and asked her to approach his vehicle. After some discussion, Bjorn leaned over and kissed her. App. 198a. The next day Bjorn called Temple into his office and asked her how she felt about the incident. Temple advised him that she was surprised and that it was somewhat upsetting. She said that they both agreed to "just forget about it as if it did not happen". App. 198a-199a. Temple was given special attention by Bjorn with sales assistance. App. 199a. In addition to the kiss, Bjorn engaged in other comments which caused her to believe that Bjorn wanted to have a romantic relationship with her. App. 201a. Temple described the atmosphere in the workplace as being very flirtatious toward her

in a continuing manner. Temple said that the flirtatious conduct at the office was directed solely toward women and not toward men. App. 201a-202a. On a sales call in Washington, D.C., Bjorn told Temple that he "did not fool around on his wife, but if she was interested that he would be". App. 202a-203a. Temple was intimidated by the proposition and viewed it as unprofessional. App. 202a-203a. Bjorn spent an excessive amount of time at her desk and a great deal of time with her. App. 207a. **Contrary to Temple's testimony and unsupported by other evidence in the record the district court found as a matter of fact: "Another employee, Sue Foreman Temple, testified she leaned into Bjorn's car in a parking lot and kissed him after Bjorn and Temple had been drinking heavily after work. Bjorn never asked Temple for sex, never asked Temple out on a date, and he did not engage in any unwelcome conduct toward her. Temple testified Bjorn never touched her in an unwelcome manner."** App. 6a, 42a ¶ 34. Several months after the incident of the kiss and the proposition she described what had occurred to her manager, John Lyons ("Lyons"). Shortly thereafter she was fired by Lyons and Bjorn. App. 207a-209a.

After her resignation, Burns was contacted by Heidelberger who advised her that UniNet had established an office in Frederick, Maryland and that he wanted her to return. App. 304a. Burns advised him that she feared that if she returned that the ill treatment of Bjorn toward her would resume. Heidelberger told her that the Frederick office was "fairly autonomous from Bjorn" and that she would need have very little contact with him. He further advised her that she would have an unlimited sales territory

except for the northern Virginia area which was covered by the Herndon office. App. 305a. **Contrary to the testimony of Heidelberger and Burns and unsupported by any other evidence in the record the district court found as a matter of fact that: Sales managers Heidelberger, Gavitt and Lyons, divided up UniNet's sales territory around the Frederick and Herndon offices and that Burns was aware of the division of the sales territories when she became re-employed.** App. 8a, 45a ¶ 49. Heidelberger described Burns' territory as "open territory [means] there are no boundaries, that a sales rep has the ability to sell in whatever general area we are working in." App. 150a.

Heidelberger assured Burns that he would provide all assistance necessary. In reliance upon those representations in October of 1993, Burns accepted the position of Senior Sales Representative for the Frederick, Maryland office of UniNet at a base salary of $25,000 per year plus commission. App. 305a. From October of 1993 until March of 1994, Burns had no problems with either co-employees or any management personnel. App. 306a-307a.

In March Heidelberger announced his departure. Burns discussed the Frederick management position with Leo Harris (chairman of the Boards of UniNet and SCCI) who advised her that he had considered offering the position to her. Thereafter, Bjorn who served as acting manager of the Frederick office, approached Burns in the warehouse and advised her that she was welcome to apply for the management position, but that the pay would be only $35,000 per year and that he would be on her constantly if she took the position. App. 310a-311a. Burns

declined the position as a result of the fact that it would have required her to report directly to Bjorn. App. 311a.

Later Bjorn approached Burns at the copy machine and asked her if she had heard he had separated from his wife. Bjorn complained that he could not seem to find a woman who could "so much as boil a pot of water" and that he was sick of women who were interested only in their careers. App. 312a. Bjorn gave Burns the impression that he was looking for someone to go out with. App. 313a.

Between March and May of 1994, while acting manager of the Frederick office, Bjorn questioned Burns concerning her calls to customers in Washington, D.C. and threatened that he would restrict her from that territory. App. 314a. In April of 1994 Burns received an extension of her base salary of $25,000.00. The district court's finding that, **"Burns requested the extension of enhanced salary from Chairman Harris in violation of UniNet's chain of command. Burns did not address the salary extension with her immediate supervisor or with Bjorn"** (App. 8a, 44a-45a ¶ 46) is in exact opposition to the evidence presented at trial through the testimony of Burns and Respondents' exhibit 37 (App. 449a) revealing that the request was made to Bjorn who was then acting sales manager and President. Eventually Pam Edelman ("Edelman") was hired as the manager of the Frederick office.

Burns sales territories were changed on two occasions. First she was restricted from calling on customers in Washington, D.C. and relegated to the territory known as the I-270 corridor which was the area from outside Frederick, Maryland to the boundary of

Washington, D.C. Later Bjorn reduced Burns' sales territory to the area within a single zip code in the I-270 corridor in Rockville, Maryland. App. 318a. The reduction of her sales territory drastically limited Burns' ability to acquire large accounts which had been her major source of income and were largely unavailable in the restricted sales territory. **There was, however, no evidence to support the district court's factual finding, "that Burns continued to attempt to call on customers in D.C. and refused to accept the division prescribed by management".** App. 8a, 45a ¶ 49. In regard to the division of territories, the district court also made the following findings of fact which are wholly unsupported by any evidence presented at trial: **The Frederick territory was divided around the sales representatives in accordance with their wishes and Burns demanded the most lucrative territory in Maryland, leaving other sales representatives with little or no productive territory. Burns complained whenever another sales representative contacted a potential new customer in her territory and Burns did little or no cold calling herself to increase the amount customers in her territory.** App. 8a, 45a ¶ 50.

In October of 1994, Bjorn's quoted delivery time for sales of computer equipment was five to seven business days. Burns' deliveries were delayed as long as twenty-one business days causing Burns to lose three accounts. Others at UniNet did not experience the same delivery problems. App. 319a. Burns felt that Bjorn was purposely re-prioritizing her orders to a position behind other sales representatives as he had done in 1992. App.

320a-321a. A meeting was scheduled at Frederick in November with Bjorn, the sales representatives and Edelman. App. 321a. Upon the commencement of the meeting, Bjorn pointed his finger at Burns and acknowledged the allegation that her orders were being purposely withheld. Bjorn stated to Burns in the presence of all that if she didn't like it that she should get a job selling shoes. Burns was humiliated by Bjorn's comment to her in front of the other sales representatives and her manager. App. 323a-324a.

On November 23, 1994, Burns submitted a memorandum to Bjorn with copies to Edelman and Harris lodging a formal complaint of Bjorn's harassment. PE 34. A meeting was then scheduled at SCCI with UniNet management, the personnel manager at SCCI (App. 333a) and Ed Bjorn (John Bjorn's father and president of SCCI). During the meeting, Burns advised that she had left UniNet in 1992 because of Bjorn's harassment of her. She described Bjorn's initial flirtations and assistance and the sudden change in his behavior toward her consisting of harassment to the point that she was forced to quit. Burns stated that Temple had told her that Bjorn had flirted with her and thereafter she was terminated abruptly for unjustified reasons. Burns also advised that Bjorn was then dating another UniNet employee. App. 334a. She perceived that no relief would result from the meeting. App. 338a-339a. On November 28, 1994, she filed a complaint of sex discrimination with the EEOC. App. 338a.

Immediately after the filing by Burns of the EEOC complaint, new rules and regulations were established for the Frederick office. App. 334a-335a. Following the revised policies and procedures of December 5, 1994, and continuing through her

termination on March 10, 1995, Burns described constantly shifting policies and procedures. Burns was particularly subjected to conflicting and discriminatory policies. The UniNet policy for a sales representative to obtain the shipping date of an order was changed several times after the filing of her EEOC complaint. App. **In regard to the sales orders policy, the district court made the following finding of fact which is wholly unsupported by the evidence: Burns was warned by her immediate supervisor, Pam Edelman, that she was not permitted to call other personnel to check on the status of sales orders; that Burns had disregarded the warning and violated established policy by regularly contacting both Beisemeyer and Mossburg without sales manager approval or knowledge to seek exceptions to established purchasing policies**. App. 11a, 50a-51a ¶¶ 72, 73.

Diana Wilson was employed at UniNet from January of 1994 through March of 1995 and assigned the responsibility of answering the phone. She had been instructed by Bjorn on a particular occasion to refuse to connect Burns' calls to the purchasing agent. App. 238a. At the same time, she was unaware of any policy which restricted sales persons from contacting the purchasing agent and in fact, sales representatives frequently called the purchasing agent to check on orders. App. 241a. When she was directed not to connect Burns' calls to the purchasing agent, Burns' calls were no greater in number than calls made by other sales representatives to the purchasing agent. App. 252a. **Contrary to Wilson's testimony and unsupported by other evidence, the district court found as fact, "On one occasion,**

Burns called Beisemeyer so many times to seek approval of a special order that Bjorn instructed Beisemeyer not to accept any more calls from Burns that day so that Beisemeyer could perform her regular purchasing duties. App. 11a, 50a-51a ¶ 73.

After the filing the EEOC complaint new quotas and responsibilities were placed upon Burns and as a result of UniNet's failure to make prompt deliveries to her customers Burns was losing customers, but no one seemed to care. App. 350a-351a. Near the end of January, 1995, Harris advised Burns that the internal investigation of her complaint was complete and scheduled a meeting with him and Morrell for January 25th. App. 352a. Harris stated that the company found no evidence of sexual harassment or harassment on any basis. App. 353a. Harris told Burns that the EEOC investigation was "costing a lot of time and money and that she was the only one that could make it go away". App. 354a-355a. Within a week of the meeting John Lyons became manager of the Frederick office and enacted another new set of policies and procedures. App. 356a-357a. On January 31, 1995, Lyons issued a memo regarding policy and procedure review at the Frederick, Maryland office. App. 439a. The memorandum provided for probation prior to termination.

Burns was unjustifiably placed on probation at the beginning of February; when she objected the probation was rescinded. **The district court's following finding of fact regarding the memorandum which removed Burns from probation is contrary to the language of the memorandum and entirely without basis in the record: "however, in the notice removing**

her from probation, Lyons specifically directed, and Burns acknowledged, to cease complaining about UniNet's sales and order policies and to start selling." App. 11a, 52a-53a ¶ 80, (memo at 432a). At the end of February, Lyons provided a performance review to Burns stating that she was cooperative; had a great attitude; that he enjoyed working with her and that her sales were "great". He also commented that her technical skills were better than he originally thought they were. App. 358a-359a. When Burns asked Lyons to put the review in writing, he said he needed to speak with Bjorn. Lyons went to Herndon and returned advising Burns that he was prohibited by Bjorn from giving her a written review. App. 359a.

Immediately following the review, a series of unusual events occurred. Burns' largest account was Loudoun Hospital which was one of the largest accounts that UniNet had ever had. Burns had an excellent working relationship with the hospital. After Bjorn commenced a policy of holding orders for customers sixty days in arrears on payments, she had emphasized to Loudoun Hospital the importance of being current in its payments. By March of 1995, the hospital was current in its payments for the first time since it had been a customer of UniNet. App. 361a. In spite of that fact, Bjorn advised Burns by telephone that he planned to visit the hospital to discuss its past payment problems. App. 362a. Loudoun Hospital contacted Burns regarding the proposed meeting and consequently she wrote a memorandum to Harris inquiring whether it made good business sense to discuss past payment problems with UniNet's largest customer when its account was then, in fact, current. Harris met with Burns and

advised her that Bjorn was scheduled to meet with Loudoun Hospital for a "good will visit". When Burns relayed what Bjorn had said concerning his purpose for the visit, Harris ignored her. App. 363a-364a.

On the day that Burns learned that it was certain that Bjorn would visit her major account, potentially destroying the relationship which Burns and UniNet had with the account, Burns suffered what she later learned from her doctor was a panic attack. App. 365a. As she typed a memorandum to Harris concerning the affair, Burns began shaking and had a horrible feeling. She could not understand what was happening to her and was very fearful. At the time of the attack there was no manager in the office. After finishing and sending the memo, she was physically unable to remain for the balance of the day. App. 365a-366a. **The district court made the following finding of fact regarding the incident: On March 9, 1995, Burns left work without notice. She walked out after her supervisor had left the office and claims to have faxed a note to Bjorn and SCCI President, Ed Bjorn, further complaining about decisions and actions of UniNet.** App. 11a, 53a ¶ 83. There was no dispute over the fact that Burns had actually telefaxed notice of her departure to the individuals indicated. There was no evidence regarding the presence or absence of her manager or other supervisor at the office at any time on the date in question.

When Burns returned to work the following day, Lyons advised that her employment was terminated for leaving work early without a manager's approval and because she was unable to follow company procedures and guidelines. App. 366a. Burns

testified that she had not refused to follow any company procedure or guideline nor was she ever advised by anyone at UniNet that she had violated a company procedure or guideline. App. 366a. Burns was not on probation at the time of her termination.

In response to an interrogatory, UniNet identified each instance of a failure to follow a policy or procedure by Burns which served as cause for Burns' termination (App. 444a-446a) and stated only that Burns had not obtained management approval prior to leaving work on March 9th. UniNet had no policy for a sudden illness; the sick leave policy in UniNet's handbook does not address sudden emergencies. PE 108. The interrogatory response inaccurately reflects the content of Burns' March 9th memo. **The district court's finding that "On March 10, 1995, UniNet discharged Burns for failure to perform in accordance with UniNet's policies, procedures and management guidelines"** (App. 11a-12a, 54a ¶ 84) is contrary to Burns' testimony and the reasons stated by respondents in response to interrogatories, the only evidence before the district court on the subject. Burns testified that it was her desire to keep her job at UniNet. App. 409a.

Dr. Charles C. Titus, a Board Certified psychiatrist, testified that at a session on March 14, 1995 Burns advised him that she had been fired and that the firing was a major surprise for her because she had received a great review the week prior to the firing. Dr. Titus stated that the symptoms of a panic attack included extreme fear, rapid heartbeat and a conviction that one was going to either pass out or die. He said a panic attack is the most extreme form of anxiety that we know. App. 99a-103a.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals Misapplied the Clearly Erroneous Standard of Review Applicable to a Judgment Granted upon Motion Pursuant to FED. R. CIV. P. 52 by Entirely Disregarding the District Court Findings of Fact Wholly Unsupported by the Evidence and Incorporated into the District Court's Memorandum Opinion from the Prevailing Party's Proposed Findings of Fact and Conclusions of Law.

The Court has commented with disfavor upon the district court practice of allowing findings of fact and conclusions of law required by FED. R. CIV. P. 52(a) to be drafted by counsel for the prevailing party. In its comments, the Court has stated that such findings leave much to be desired in light of the function of the trial court, but that the findings are nonetheless the findings of the district court. They must stand or fall depending upon whether they are supported by the evidence. Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 573 (1985), United States v. El Paso Natural Gas Co. et al., 376 U.S. 651, 656 (1964). United States v. Crescent Amusement Co., et al., 323 U.S. 173, 185 (1944). To date only those cases which stand have been considered by the Court. The case at bar is a case which much fall. When considering whether the facts are supported by the record of a judgment rendered pursuant to FED. R. CIV. P. 52, the appellate court is bound to apply the clearly erroneous standard. A decision is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.

Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 573 (1985). It is patent that such a standard of review is highly deferential to the factual findings of the district court; however, it is equally patent that the appellate court must review the entire record.

> The conclusiveness of a 'finding of fact' depends upon the nature of the materials on which the finding is based. The finding even on a so-called 'subsidiary fact' may be a more or less difficult process varying according to the simplicity or subtlety of the type of 'fact' in controversy. Finding so-called ultimate 'facts' more clearly implies the application of standards of law. And so the 'finding of fact' even if made by two courts may go beyond the determination that should not be set aside here. Though labeled 'finding of fact', it may involve the very basis on which judgment of fallible evidence is to be made. Thus, the conclusion that may be appropriately drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this court. Bose Corporation v. Consumer's Union of the United States, Inc., 466 U.S. 485, 501, (1984).

In this instance, the findings of fact designated herein have no basis in evidence. The requirement that special deference be given to a trial court's credibility determinations is itself a recognition of the broader proposition that the presumption of correctness that attaches to factual findings is stronger in some cases than in others. Bose, Id. Where findings of fact are exhibited to be contrary to the evidence and without support in evidence, then there can be no presumption of correctness and instead the taint

of the improper considerations must be deemed to infect the entire process. The essence of the judicial function is to arrive at judicial determinations based solely upon the evidence presented.

The Fourth Circuit's opinion recites that it had examined the record and was constrained to reject Burns' contention that the district court's "critical" (emphasis supplied) findings were not rooted in the evidence presented at trial. The opinion refers to, but does not address, the fifteen factual discrepancies designated by Burns. App. 26a. It is thus, apparent that when reviewing the district court's fact finding process, the Fourth Circuit entirely disregarded factual findings unsupported by the record and based its decision strictly upon its review of those findings of fact for which the Fourth Circuit found support in the evidence without considering the impact of the unsupported factual findings. The error of such a process is that it is fundamentally unfair. The appellate court went on to state that the district court merely rejected, as it was entitled to do as fact finder, the inferences upon which Burns' claims of sexual discrimination and retaliation relied. App. 27a. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those who duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Lavender v. Kurn, 327 U.S. 645, 653, (1946). Where a finder of fact has arrived at factual conclusions which have no evidentiary basis and/or which are contrary to the clear and unequivocal testimony of witnesses, then any reliance upon such a fact finder to reach "the most reasonable inference" is misplaced. Human experience dictates that one who

makes adverse determinations against another without any basis will, when provided the opportunity to consider the impact of an actual fact most likely find adversely again. The fifteen discrepancies cited are baseless factual findings which serve to erroneously negate affirmative testimony of Bjorn's pattern of gender based behavior or to add facts in support of allegations of poor or insubordinate work behavior by Burns not presented at trial. The district court having reached such negative conclusions upon its own notions can hardly be relied upon to have viewed the evidence impartially. The probability is that the unsupported facts served as predicates for arriving at inferences adverse to Burns and rejection of inferences favorable to her. In view of the record, there can be no reliance upon the district court to have impartially and objectively considered the inferences which would logically flow from Burns' evidence.

II. A Judgment Based upon Facts Not in Evidence Is a Denial of Due Process. The trial record confirms the absence of evidentiary support for the factual findings cited. Those factual findings are in numerous instances contradictory of the witness testimony. (e.g. different treatment of Burns by Bjorn; Bjorn's initiation of conversations with Kearns; kissing and propositioning of Temple). In fact, in its recitation of the facts, the Fourth Circuit correctly recited that Bjorn had kissed Temple (he kissed one of his subordinates, App. 22a) in contrast to the district court's finding that Temple had kissed Bjorn. It is axiomatic that the judgment of court must be based upon the evidence presented at trial. A judgment is "the decision or sentence of law pronounced by a court or other competent tribunal upon the matter contained

in the record. A.C. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS, § 2 (4TH ed. 1892).

The affirmation of the district court judgment by the court of appeals is an error of constitutional proportions. A fair trial in a fair tribunal is a basic requirement of due process. Our system of law has always endeavored to prevent even the probability of unfairness. Withrow v. Larkin, 421 U.S. 35, 46, (1974). The limitation of consideration of facts in all judicial proceedings to those which are supported by evidence presented to the tribunal which renders the decision is an indispensable element of every trial which may be deemed "fair". The converse is equally true, i.e., a trial in which consideration of facts not presented in evidence occurs is by definition a deprivation of a fair trial. When the decision is based in any part upon the finding of a factual occurrence pre-dating[3] the proceeding under consideration which has no evidentiary support the probability of unfairness exits. To perform its high function in the best way, justice must satisfy the appearance of justice. In re: Murchison, 349 U.S. 133, 136, (1955).

The decisions of this Court are clear and unequivocal that in criminal proceedings, consideration of matters outside the record or even the possibility of consideration of matters outside the record is a denial of due process. Taylor v. Kentucky, 436 U.S. 478, 483, (1978). Noto v. United States, 367 U.S. 290, 297,

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[3] This Court has approved consideration of certain circumstances occurring after the proceeding, but not those which pre-date it. See: Dakota County v. Gliddon, 113 U.S. 22 (1885).

(1960). It has not, however, been pronounced in unequivocal, positive and clear language that in civil cases the same commonly recognized standard must prevail as a matter of right guaranteed to the people by the Fifth Amendment to the United States Constitution.

Section 15 of the Virginia Declaration of Rights, drafted by George Mason and unanimously adopted by the Virginia House of Burgesses on June 12, 1776 is no less applicable today than it was then: "That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality and virtue and by frequent recurrence to fundamental principles". DECLARATION OF RIGHTS (1776), *reprinted* in III THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA, at 3814 (Francis Newton Thorpe, ed., 1906, Government Printing Office 1909).

The necessity that civil judgments be based solely upon evidence presented is such a fundamental principle, the recurrence to which is sought.

III. The Decision of the Appellate Court on Retaliatory Discharge Conflicts with the Holding in Reeves v. Sanderson Plumbing Products, Inc. The Fourth Circuit held that evidence sufficient to prove Burns prima facie case of retaliation was insufficient to prove her claim of retaliation on the merits. App. 30a. Citing its authority in Williams v. Cerberonics, 871 F2d 452 (4th Cir. 1989), the Fourth Circuit stated that as proof of a prima facie case a plaintiff may demonstrate the casual relation between

the exercise of the protected right and the adverse employment action through evidence of the temporal relationship between the date of plaintiff's termination and the date of employer's knowledge of the filing of a discrimination charge and noted that the passage of time in Burns' case was only two weeks longer than the time held sufficient to demonstrate prima facie causation in Cerberonics. The appellate court concluded, however, that the district court had not ruled upon the sufficiency of a prima facie case of retaliation, rather it had ruled on the merits.

This distinction between the Fourth Circuit's view of Burns' prima facie case contrasted with its view of her case on the merits, where the review is of a judgment granted at the close of Burns' case-in-chief confirms that its review applied the Fourth Circuit standard in Theard v. Glaxo, Inc., 47 F.3d 676 (4th Cir. 1995) requiring affirmative direct evidence of discrimination. The appellate court expressly declined to consider "the evidence establishing the plaintiff's prima facie case and the inferences properly drawn therefrom" when considering Burns' case on the merits contrary to Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 147 L. Ed. 2d 105; 68 U.S.L.W. 4480 (2220). This reasoning is in direct conflict with this Court's opinion in Reeves stating that a plaintiff's prima facie case, combined with sufficient evidence to find that the employers asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discrimination.

IV. The District Court Abused its Discretion by Failing to Grant Burns' Motion for a Jury Trial. Burns' complaint omitted a request for jury trial and accordingly Burns filed a

Motion for Jury Trial pursuant to FED. R. CIV. P. 39(b). The district court denied Burns' Motion for Jury Trial, ruling that although the factors cited by Burns in accordance with local authority may have supported the award of a jury trial that the sanctity of FED. R. CIV. P. 38 required that the motion be denied. App. 94a-95a.

Such a ruling has the effect of nullifying FED. R. CIV. P. 39(b) and is therefore an abuse of discretion. No motion could be made for a jury trial pursuant to the provisions of FED. R. CIV. P. 39(b) unless there had been a failure to demand a jury pursuant to FED. R. CIV. P. 38. The second sentence of FED. R. CIV. P. 39(b) is subject to no interpretation other than that its intent is to grant authority to the district court, in the exercise of its sound discretion, to relieve a party from a failure to demand a jury trial pursuant to FED. R. CIV. P. 38 and to order a trial by jury notwithstanding the party's failure to have made the demand. The Federal Rules of Civil Procedure are to be interpreted in accordance with their plain meaning. Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533, (1991). Where the determining factor relied upon in denying a jury request pursuant to FED. R. CIV. P. 39(b) is the maintenance of the integrity of FED. R. CIV. P. 38, the ruling simultaneously undermines the integrity of FED. R. CIV. P. 39(b) by establishing a standard which renders the rule meaningless. As a statute must be construed to support, rather than to defeat it, the same reasoning must apply to the interpretation of the Rule. Crowell v. Benson, 285 U.S. 22, 46, (1932). By granting the discretion to allow a jury trial when none has previously been demanded, the

Rule contains the necessary implication that there are circumstances when FED. R. CIV. P. 38 is not complied with that relief should be granted pursuant to FED. R. CIV. P. 39(b). The rule obligated the district court to determine whether Burns fell within such circumstances. The failure to make that determination is error. The appellate court approved the process and the standard. App. 32a. The factors which the district court considered exclusive of the integrity of the rules weighed in favor of the grant of a jury trial and accordingly, it was an abuse of discretion to deny Burns' motion.

CONCLUSION

Burns acknowledges the admonition in Sup. Ct. R. 10 pertaining to erroneous factual findings. The case at bar, however, submits an egregious departure from all commonly accepted notions of the proper role of the judiciary in the fact finding process and calls for the Court's exercise of its supervisory power. Sup. Ct. R. 10(a). The very essence of the judicial function is factual resolution based upon reliable information presented . Within the context of this function it is the height of caprice to make the resolution on information not presented and constitutes a deprivation of an elemental and fundamental principle of justice recognized both at common law and in all enlightened judicial codes preceding common law. Hyperbole of litigants and their counsel are a common occurrence as demonstrated in the proposed findings of fact submitted by the respondents in advance of trial at the district court. It is not,

however, hyperbole which bring this case to the attention of the Court. The factual discrepancies cited to the lower courts and ignored are as absent from the record as is the equator from the poles; the course of determining that absence, unfortunately requires the tedious task of an examination of all of the trial testimony which has been provided in the appendix.

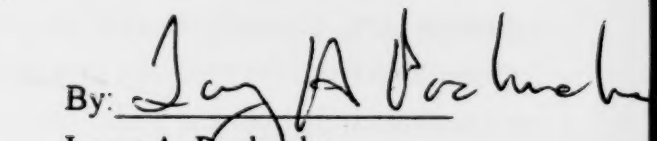
The Court is urged to reaffirm that FED. R. CIV. P. 52 has meaning and requires a district court to arrive at is own conclusions from the evidence presented. The Court is requested to pronounce that review under the "clearly erroneous" standard requires the appellate court to review the entire trial record, not merely in search of support for the district court's findings, but also to determine whether there exists within the record grounds for that which the appealing party alleges and to determine ultimately whether the fact finding process has been principled.

Burns submits that she has proved sex discrimination under the principles set forth in Burlington Indus, Inc. v. Ellerth, 524 U.S. 742 (1998); retaliatory discharge under the principles set forth in Reeves and that SCCI and UniNet constituted a single employer under the principles of Johnson v. Flowers Industry, Inc., 814 F.2d 978 (4th Cir. 1987). Space does not permit recitation of the facts in conjunction with legal authority on those issues other than that already provided. These issues warrant full consideration and will be addressed, given the opportunity, upon the grant of this petition. The failure to exercise discretion pursuant to FED. R. CIV. P. 39(b) and the standards applicable to

such a motion have not previously been addressed by the Court. For all of the foregoing reasons it is respectfully requested that a writ of certiorari be granted.

Respectfully submitted,

PATRICIA B. BURNS

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No. _____

In The Supreme Court of the United States

PATRICIA B. BURNS,

Petitioner,

v.

UNINET, INCORPORATED, and SOUTHEASTERN COMPUTER CONSULTANTS, INC.,

Respondents.

ON PETITION FOR *WRIT* OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX (VOLUME I OF II) TO PETITION FOR *WRIT* OF *CERTIORARI*

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

PATRICIA B. BURNS,	)	
	)	
Plaintiff,	)	
	)	
	)	CIVIL ACTION NO: 98-0382-A
	)	
UNINET, INC., et al.,	)	
	)	
Defendants.	)	

ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED that this case is DISMISSED.

/s/ Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
January 29, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

PATRICIA B. BURNS,	)	
	)	
Plaintiff,	)	
	)	
	)	CIVIL ACTION NO: 98-0382-A
	)	
UNINET, INC., et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This case came before the Court for trial without a jury. At the conclusion of the plaintiffs evidence, the Court granted the defendants, motion for judgment as a matter of law.

Plaintiff, Patricia B. Burns ("Burns"), was employed by UniNet from December 1990 through August 24, 1992 during her first period of employment (hereinafter "first period of employment") in the Herndon, Virginia office. Burns was employed from October 1993 through March 10, 1995 during her second period of employment, (hereinafter "second period of employment") in UniNet's Frederick, Maryland office. John E. Bjorn ("Bjorn") served as president of UniNet from its inception

in 1990 until September 1995.

Burns has alleged that, during her employment with UniNet, Bjorn was the only individual who sexually harassed her, discriminated against her or retaliated against her.

After Burns started her employment, she attended sales calls with Bjorn. Although Todd Heidelberger ("Heidelberger") was Burns' direct supervisor, Bjorn had regular involvement with Burns' sales accounts for UniNet. Bjorn also assisted Burns with training and sales calls and observed her performance. Bjorn, with respect to Burns' training, provided sales assistance, evaluated her performance, and treated her the same as other sales representatives.

During Burns' employment with UniNet, both men and women were promoted, placed on probation, and discharged for cause. Most of the sales representatives during each of Burns' two period of employment with UniNet were women, including one of Burns' managers during her second period of employment, Pam Edelman. Burns, herself, was promoted to senior sales representative in December 1991.

During the latter part of Burns, first period of employment, she began failing or refusing to make cold calls to increase UniNet's customer base. She also failed and/or inadequately and untimely prepared Return Merchandise Authorization Forms ("RMAs") to document returned equipment for credit, causing

UniNet to lose money. Bjorn criticized and counseled Burns and others for these acts. Burns, however, did not adhere to Bjorn's directions. Instead, Burns started complaining that UniNet was delaying shipment orders for customers designated to her.

Burns never complained of sexual harassment, gender discrimination, or retaliation during her first period of employment with UniNet. The only complaint Burns made during her first period of employment was in approximately June 1992 to her supervisor, Heidelberger. Burns complained to Heidelberger that Bjorn was treating her harshly, that her sales were not being prioritized, that her clients were being pushed to the side, and that she was being "mistreated."

When she met with Heidelberqer in June 1992, Burns informed him that "I feel like I'm being abused or harassed." Heidelberger asked Burns: "do you feel you are being sexually harassed?" Burns responded: "no, more emotional harassment."

Heidelberger reported to Bjorn that Burns was complaining about company policies. Bjorn met with Burns to discuss her concerns regarding prioritization of sales orders. During this meeting with Bjorn, Burns did not tell Bjorn that she believed that she was being sexually harassed or discriminated against or that she was being treated differently because of her gender.

Burns wrote a follow-up memorandum to Heidelberger

after her meeting with Bjorn that summarized the business issues she and Bjorn discussed. Burns did not mention harassment, nor did she claim that she was singled out because of her gender.

Burns voluntarily- resigned her employment with UniNet in August 1992.

The only unwelcome conduct Burns alleges Bjorn committed during the first period of employment is the following:

- paying more attention to Burns then other women in the office;
- talking about personal, non-business topics with Burns;
- talking about his marital situation with Burns; laughing and joking around Burns; hanging around Burns, desk "all the time"; and
- gazing at Burns' legs when he approached Burns to talk with her.

Plaintiff presented no evidence that Bjorn asked her for sex or for a date. Bjorn never touched Burns, except for one occasion in 1991 during a sales call when Bjorn put his hand behind Burns' back to guide her while they were crossing a busy street in the District of Columbia. Bjorn removed his arm from Burns once they reached the curb on the other side. Bjorn never touched any private part of Burns, never kissed Burns and never attempted to kiss her or hold her hand. Additionally, Bjorn never made any comments of a sexual nature or comments regarding body parts to

Burns.

On one occasion in early 1991, both Burns and Bjorn attended a happy hour. Although several UniNet employees were invited by others to attend the after-work happy hour, no other UniNet employees attended. Both Burns and Bjorn had drinks and discussed business and personal (non-sexual) issues. After finishing their drinks, Burns and Bjorn each departed from the restaurant alone.

An employee in the Herndon office of UniNet, Maureen Kearns testified she initiated personal conversations with Bjorn. Bjorn, however, did not spend a disproportionate amount of time around her, nor did he take any action to initiate a sexual relationship with her.

Another employee, Susan Foreman Temple, testified she leaned into Bjorn's car in a parking lot and kissed him after Bjorn and Temple had been drinking heavily after work. Bjorn never asked Temple for sex, never asked Temple out on a date, and he did not engage in any unwelcome conduct toward her. Temple testified Bjorn never touched her in an unwelcome manner.

Neither Kearns nor Temple ever complained during her respective employment that she was sexually harassed by Bjorn, or that any of Bjorn's conduct was unwelcome. No woman employed at UniNet complained that she was sexually harassed by Bjorn or that she suffered any unwelcome sexual conduct by

Bjorn.

On October 24, 1993, Burns was rehired by UniNet as a senior sales representative and assigned to the Frederick, Maryland office of UniNet.

By memorandum dated June 27, 1994, UniNet sales representatives were informed that the purchasing office would no longer accept orders with a required delivery date of less than five business days. Additionally, sales representatives were informed that there would be no exceptions to this purchasing policy and that any special orders required approval by a sales manager.

Burns immediately challenged this new purchasing policy. By memorandum dated June 29, 1994, Burns openly questioned the new policy and complained that the new policy would result in lost revenue for UniNet and lost income for Burns.

By memorandum dated June 30, 1994, Burns sought an exception to the 60 day policy requiring the buyer to pay within "60 days" for an order placed by Loudoun Hospital. By memorandum dated December 9, 1994, Burns sought an exception to the 60 day policy for another order placed by Loudoun Hospital. On numerous occasions, Burns complained about the 60 day policy, the five day rule, and sought exceptions to the established purchasing policies for orders placed by her customers.

At the end of the initial six month period, Burns requested that her base salary of $25, 000 be continued an additional six months. Burns requested the extension of enhanced salary from Chairman Harris in violation of UniNet's chain of command. Burns did not address the salary extension with her immediate supervisor or with Bjorn. UniNet, through Bjorn, granted Burns' request for an extension of her base salary.

Bjorn and the sales managers, Heidelberger, Gavitt and Lyons, divided up UniNet's sales territory around the Frederick and Herndon offices. The Herndon office included Virginia and the District of Columbia. The Frederick office, where Burns was employed, divided Maryland. Burns was aware of the division when she became re-employed. Despite the knowledge, Burns continued to attempt to call on customers in D.C. and refused to accept the division prescribed by management.

UniNet hired additional sales help in Frederick (Michael McLane and Allen Shirey), and divided the Frederick territory around the sales representatives in accordance with their wishes. Burns demanded the most lucrative territory in Maryland (Rockville), leaving the other sales representatives with little or no productive territory. Burns further complained whenever another sales representative contacted a potential new customer in her territory. However, Burns did little or no cold calling herself to increase the amount of customers in her territory.

After Heidelberger resigned in March 1994, Bjorn invited

Burns to apply and interview for the position of Frederick Branch Manager. Burns declined to apply for the branch manager position. Burns did, however, request management to assign her to the Loudoun Hospital account, which she had handled during her first period of employment in the Herndon, Virginia office. The Loudoun Hospital account was a large UniNet sales account. Loudoun Hospital was also a slow payer that consistently allowed its invoices to remain unpaid for more than 60 days and often more than 90 days. UniNet granted Burns' request and assigned her the Loudoun Hospital account, even though that account should have been assigned to sales personnel in UniNet's Herndon office.

In her April 15, 1994 memorandum to Bjorn seeking an extension of her enhanced base salary, Burns alternatively requested a transfer to the Herndon, Virginia office. If her request had been granted, Burns would have worked in close proximity to Bjorn at Herndon.

Immediately before her enhanced salary extension expired in September 1994, Burns made a second enhanced salary extension request to her immediate supervisor, Pam Edelman. Claiming that Bjorn had not responded to the request, Burns took her request to Chairman Harris. UniNet denied Burns, second request for an extension in October 1994.

Following UniNet's denial of her second enhanced salary extension request in October 1994, Burns wrote 24 memos

detailing her complaints about UniNet's policies and procedures.

On November 23, 1994, Burns wrote a complaint memo claiming for the first time that she had been subject to "harassment" by Bjorn "over approximately the last six months."

Burns sent her November 23, 1994 memo to Bjorn and copies to SCCI's President. The SCCI President and SCCI's human resources manager, Lorie Morrell, immediately met with Burns to discuss the concerns raised in her memorandum.

During the November 23, 1994 meeting, Burns stated for the first time that the "harassment" alleged in her memorandum related to Bjorn's alleged "flirtations," and her rejection of those "flirtations" during her first period of employment with UniNet years earlier in 1991 and 1992. She did not identify any sexual conduct or "flirtation" that had occurred since UniNet had re-employed her in October 1993.

Five days later, UniNet received Burns' first EEOC charge. Morrell immediately met with Burns. During that meeting, Burns claimed for the first time that Bjorn had engaged in sexual harassment.

After Burns filed her EEOC charge, she intensified her written and verbal complaints about UniNet's policies. Her chief complaints related to delays in the ordering and delivery of products for her customers.

By memorandum dated January 26, 1995, Burns was warned by her immediate supervisor, Pam Edelman, that she, like all sales representatives, was not permitted to call other personnel to check on the status of orders. Burns disregarded this warning and violated this established policy by regularly contacting both Beisemeyer and Mossburg, without sales manager approval or knowledge, to seek exceptions to established purchasing policies. On one occasion, Burns called Beisemeyer so many times to seek approval of a special order that Bjorn instructed Beisemeyer not to accept any more calls from Burns that day so that Beisemeyer could perform her regular purchasing duties.

On February 1, 1995, Lyons placed Burns, McLane, and Shirey on probation for failure to meet sales quotas. After being placed on probation, Burns requested that her probation be reconsidered. UniNet granted Burns' request and removed Burns from probation in February 1995. However, in the notice removing her from probation, Lyons specifically directed, and Burns acknowledged, to cease complaining about UniNet's sales and order policies and to start selling.

On March 9. 1995, Burns left work without notice. She walked out after her supervisor had left the office and claims to have faxed a note to Bjorn and SCCI President, Ed Bjorn, further complaining about decisions and actions of UniNet.

On March 10, 1995, UniNet discharged Burns for failure to perform in accordance with UniNet's Policies, procedures, and

management guidelines.

Quid pro quo sexual harassment occurs when an employer demands sexual favors from an employee in return for a job benefit. See Burlington Indus., Inc., v. Ellerth, 118 S. Ct. 2257, 2264 (1998). This harassment occurs when an employer explicitly or implicitly condition, the receipt of a job benefit or detriment on the employees acceptance or rejection of sexual advances. See Spencer v. General Elec. Co., 894 F.2d 651, 658 (4th Cir. 1990).

In the present case, there is no evidence that Bjorn made sexual advances to Burns. Ms. Burns experienced no overt sexual conduct by Bjorn or by any supervisors. Bjorn never asked her on a date, never asked her for sex, never touched her inappropriately, and never made sexual comments to her or anyone else at UniNet. Neither did Bjorn demand sexual favors from Burns in return for a job benefit. No evidence of any demand for sexual favors of any kind exists in this case. Therefore, the receipt of a job benefit or a tangible job detriment was never conditioned upon Burns' acceptance or rejection of sexual advances. Reinhold Commonwealth of Virginia, 135 F.3d at 931.

To establish a claim for hostile work environment sexual harassment, a plaintiff must prove (1) that she was harassed because of her sex; (2) that the harassment was unwelcome; (3) that the harassment was sufficiently severe or pervasive to create an abusive working environment; and (4) that some basis exists for imputing liability to the employer. See Wrightson v. Pizza Hut of

America, Inc., 99 F.3d 138, 142 (4th Cir. 1996); Spicer v. Commonwealth of Virginia, 66 F.3d 705, 710 (4th Cir. 1995).

Burns must prove an essential element of causation: the harassment or other conduct allegedly occurred because of her gender. See Tietgen v. Brown's Westminister Motors, Inc., 921 F. Supp. 1495, 1501 (E.D. Va. 1996). Harassing conduct that is sexually neutral or, at most, ambiguous, is not within the reach of Title VII, Tietgen, 921 F. Supp. at 1500-01, quoting Hopkins Baltimore Gag & Elec. Co., 77 F. 3d 745, 7S3 (4th Cir. 1996). Burns has failed to offer any evidence that the conduct of Bjorn or any other action of UniNet or SCCI occurred because of her gender. The conduct complained of; paying attention to Burns, discussing personal matters with Burns, providing sales assistance to Burns, asking Burns to attend office happy hours, joking around with Burns, discussing his marriage with Burns and alleging retaliation against Burns; is sexually neutral or, at most, ambiguous. See e.g., Hopkins, 77 F.3d at 753 (causation element not satisfied by supervisor who stares at employee in bathroom, kisses employee at receiving line at his wedding and bumps into employee). Burns has failed to prove that UniNet or SCCI took any action or retaliated against her or harassed her because of her gender. There is no evidence that any of the business policy or practices of UniNet were created, administrated or enforced with respect to Burns because of her gender.

For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of

employment and create an abusive working environments See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986); Hopkins, 77 F.3d at 753. Relief is unavailable where the alleged conduct is not severe or pervasive enough to create an objectively hostile or abusive work environment. See Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

Accordingly, courts have confirmed the scope of actionable conduct to be that which is so objectively offensive as to alter the conditions of the plaintiff's employment. See e.g., Hartsell v. Duplex Products. Inc.,123 F.3d 766 (4th Cir. 1997) (insensitive and demeaning comments by supervisor did not establish a secure or pervasive environment). In assessing whether the work environment rises to the level of "severe and pervasive," a court must look to the totality of the circumstances, including:

> the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it reasonably interferes with an employee's work performance.

Beardsly v. Webt, 30 F.3d 524, 529 (4th Cir. 1994), quoting Harris v. Forklift Sys., 114 S. Ct. 367, 371 (1993). Further, the court may not view the behavior in a vacuum, but must give "careful consideration. of the social context in which the particular behavior occurs and is experienced by its target." Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998, 1003 (1998)

(recognizing that a coach's patting the behind of a football player is difference than an office setting).

Burns alleges that Bjorn harassed her because of her gender by asking her to attend after work office happy hours which other employees were invited to attend, by flirting with her, and by retaliating against her when she allegedly rejected the flirtation. Such conduct does not create an environment that a reasonable person would find hostile or abusive. Moreover, there is no evidence that Burns gave any indication that the conduct was unwelcome.

Burns, claim of hostile environment sexual harassment also relates to the business policies and practices of UniNet. Burns claims that UniNet promulgated, administered and enforced some of its sales, ordering and shipping policies and practices to her detriment because of her gender. The evidence presented, however, shows that the sales and shipping policies and practices of UniNet were legitimate business policies and practices and defendants have articulated legitimate business reasons for their promulgation, administration and enforcement.

To prove her claim of retaliation, Burns must show that (1) she engaged in a protected activity, such as filing a complaint with the EEOC; (2) UniNet acted adversely against her; and (3) the protected activity was causally connected to UniNet's adverse action. See Carter v. Ball, 33 F.3d 450, 460 (4th Cir. 1994). Burns has demonstrated that she has met the two elements of

proof; she filed an EEOC charge, and UniNet discharged her. However, Burns has offered no evidence to support the third element of her retaliation claim, that there is any causal connection between UniNet's adverse action and her filing a complaint with the EEOC.

Where no other evidence supports a finding of retaliatory motive, the temporal proximity between the discovery of an EEOC charge and an employee's termination is insufficient to show a causal connection. See Mathis v. Perry, 996 F. Supp. 503 (E.D. Va.1997), citing Cooper v. City of North Olmsted, 795 F.2d 1265, 1272 (6th Cir. 1986) (finding that plaintiff's discharge four months after filing discrimination claim did not support inference of retaliation). Because Burns has not offered any evidence of retaliatory motive, her claim of retaliation fails.

Burns has also claimed that SCCI is liable because it is a single employer within UniNet. For SCCI to be liable for the claims alleged in the complaint, Burns must present sufficient evidence that SCCI was her employer. SCCI was not Burns, employer because it did not "control the [UniNet's] employment decisions or so completely dominate [UniNet] that the two corporations are the same entity." See Johnson v. Flowers Indus., Inc., 814 F.2d 978, 980 (4th Cir. 1987). The Court will peer behind the corporate veil "only in extraordinary circumstances" and only if the parent dominates the subsidiary "to the extent that the subservient corporation manifests no separate corporate interests of its own and functions solely to achieve the purposes of

the dominant corporation." Johnson, 814 F.2d at 981, quoting Krivo Indus. Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098, 1106 (5th Cir. 1973). Under this authority, Burns must produce admissible evidence to establish that SCCI was her employer. Burns fails to satisfy this burden.

An appropriate Order shall issue.

/s/ Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
January 29, 1999

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PATRICIA B. BURNS,
Plaintiff-Appellant,
V.
UNINET, INCORPORATED;
SOUTHEASTERN COMPUTER
CONSULTANTS, INCORPORATED,
Defendants-Appellees,
and
JOHN E. BJORN,
Defendant.

No. 99-1264

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, Chief District Judge.
(CA-98-382)

Argued: January 24, 2000
Decided: April 5, 2000

Before NIEMEYER, Circuit Judge,
Deborah K. CHASANOW, United States District Judge
for the District of Maryland, sitting by designation,

and Andre M. DAVIS, United States District Judge
for the District of Maryland, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Larry A. Pochucha, COATES & DAVENPORT, Richmond, Virginia, for Appellant. Stephen Michael Silvestri, MILES & STOCKBRIDGE, P.C., Baltimore, Maryland, for Appellees. **ON BRIEF**: David J. Ervin, MILES & STOCKBRIDGE, P.C., McLean, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit.
See Local Rule 36(c).

OPINION

PER CURIAM:

Appellant, Patricia B. Burns, appeals from a judgment of dismissal entered at the close of the plaintiff's case in an employment discrimination action tried to the court without a jury. We affirm.

I

Burns filed a complaint asserting claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.;* she alleged sexual harassment employment discrimination, disparate treatment employment discrimination on the basis of sex, and retaliation. She did not request a jury trial. Named as defendants were UniNet, Inc., its president John E. Bjorn, and an affiliated entity, Southeastern Computer Consultants, Inc.

At the conclusion of discovery, defendants moved for summary judgment. Meanwhile, counsel for Burns, having realized that a jury trial had not been requested, filed a motion for jury trial pursuant to Fed. R. Civ. P. 39(b).[1] After a hearing on the motions, the district court granted the motion for summary judgment, in part, dismissing all claims asserted against the individual defendant, Bjorn, as well as the disparate treatment claim. Burns does not challenge these rulings on appeal. The district court denied the motion for summary judgment as to the sexual harassment and retaliation claims. The district court also denied the motion for jury trial.

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[1] Rule 39(b) provides: "Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues." Fed.R.Civ.P. 39(b).

The case proceeded to trial before the court without a jury. Burns called six witnesses and testified on her own behalf. She also introduced numerous exhibits. At the close of the plaintiff s case, defendants moved for judgment pursuant to Fed. R. Civ. P. 52(a)[2] and (c).[3] The district court granted the motion. Subsequently, the district court set out its findings of fact and conclusions of law in a written memorandum. This appeal followed.

II

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[2] Rule 52(a) provides as follows in pertinent part: "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 .... Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Fed.R.Civ.P. 52(a).

[3] Rule 52(c) provides as follows in pertinent part: "If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue .... Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule." Fed.R.Civ.P. 52(c).

Appellate review of a judgment rendered in a non-jury trial is circumscribed by the highly deferential "clearly erroneous" standard. See *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985); *Carter v. Ball*, 33 F.3d 450, 457 (4th Cir. 1994) (affirming district court's dismissal of employment discrimination case at the close of plaintiff s case). A trial court's findings of fact will only be disturbed if "'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Anderson, 470* U.S. at 574 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1947)).

III

Burns worked as a salesperson for appellee UniNet, Inc., during two separate periods. Her first tenure began in December 1990 and continued through August 1992, when she resigned voluntarily. UniNet rehired Burns in October 1993. She was discharged from employment in March 1995.

Burns presented evidence that Bjorn, the person she identified as the architect of the alleged hostile environment giving rise to her claims, was a difficult manager for whom to work. He was given to inappropriate and unprofessional outbursts in the workplace. Moreover, several former UniNet employees testified as to his flirtatious behavior. On one occasion, after a group of employees met for "happy hour" after work -- a common occurrence -- he kissed one of his subordinates. When the employee expressed her disapproval of his actions, however, no

further actions of the sort were repeated.

Apart from the evidence of the kissing incident mentioned above and one other incident in which Bjorn offered to have an affair with a female subordinate "if [she] would be interested," neither of which involved Burns, the trial was bereft of evidence of an overtly sexual nature.[4] Counsel for Burns concedes that his theory of the sexual harassment claim in the case was something of a hybrid:

> The sexual harassment of Burns at UniNet cannot be packaged to fit nicely within the framework of either a "quid pro quo" or "hostile work environment" analysis; however, an impartial review of the evidence presented at trial clearly demonstrates that Burns suffered abusive mal-treatment during the course of her employment which adversely effected the conditions of her employment and consequently her ability to achieve the level of performance otherwise obtainable solely and exclusively as a result of her gender.

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[4] On one occasion, after he had separated from his wife, Bjorn complained to Burns that he could not find a woman who could "boil a pot of water." Burns also testified that Bjorn stared at her legs.

Appellant's Brief at 35.[5]

Ultimately, therefore, Burns undertook to prove her sexual harassment claim through proof of the existence of a "pattern" allegedly followed by Bjorn whereby, shortly after a woman in whom he was personally interested started to work at UniNet, he would flirt with and otherwise seek to create a "bond" with her by providing extra assistance and mentoring. Under this theory, if and when such a female subordinate made clear her lack of any romantic interest in Bjorn, then he would turn on her and act purposefully to make her workday unpleasant and to diminish the quality of her work product. On the other hand, there was evidence that one employee, who allegedly submitted to Bjorn's advances, gained promotions and eventually became Bjorn's wife. While expressing skepticism, during trial, as to the persuasiveness of this theory under the circumstances, the district court clearly understood the underlying hypothesis of the sexual harassment claim advanced by Burns. *See* J.A. at 231-34.

Thus, Burns adduced evidence that tended to suggest that while Bjorn was generally "mean" to everybody and was prone to

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[5] The Supreme Court has noted that "quid pro quo and hostile work environment are helpful perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751 (1998).

having "fit[s]" of temper, *see id.* at 262-64, he was especially "emotionally harassing" toward her, *see id.* at 201, after he came to believe she harbored no romantic interest in him. Burns voluntarily terminated her first period of employment with UniNet, in part, because she found Bjorn's treatment of her insufferable.

When Burns rejoined UniNet in 1993, she did so partly in reliance on an assurance from her immediate super-visor that she would work in a newly-opened office in Frederick, Maryland, and would have limited contact with Bjorn. Her supervisor soon departed, however, and she was once again required to have contact with Bjorn.

The sales performance of the staff in the Frederick office declined through the end of 1994 and all of the salespersons in that office, two men and Burns, were put on probation. Burns attributed the deterioration in her performance to purposeful acts of her managers, including Bjorn, to whom she ascribed a sexually discriminatory motive.

In November 1994, Burns filed a charge of discrimination with the Equal Employment Opportunity Commission. Thereafter, according to Burns, new and ever changing operating procedures were put into place, which, again according to Burns, kept the sales staff off balance and in the dark as to what was required. Burns contends that these changes were aimed at her and were animated by UniNet's and Bjorn's retaliatory motives arising from the filing of her EEOC charge.

Finally, by March 1995, Burns was nervous, anxious and barely able to withstand the pressures of the workplace. After receiving a memorandum pointing out some further deficiency in her performance, and despairing over a planned management visit with her major client, she had a "panic attack" and departed the office without permission, leaving behind a memorandum asserting, in part, that she was "unable to perform my duties." UniNet terminated her employment the next day for the reasons set forth in the memorandum of termination, which Burns introduced in evidence.

IV

As to the merits of her discrimination and retaliation claims, fully cognizant of the burden placed upon her by the relevant standard of review, Burns has mounted a frontal attack on the district court's findings of fact. She has parsed the district court's memorandum opinion and has identified what she contends are more than a dozen "factual discrepanc[ies]" that, according to her view of the inferences reasonably arising from the evidence, fatally undermine the district court's ultimate findings and conclusions that she failed to establish by a preponderance of evidence that she was the victim of sexual harassment discrimination or retaliation.

We have closely examined the record and we are constrained to reject Appellant's contention that the district court's critical findings are not rooted in the evidence presented at trial.

The court's findings are based on the evidence and, equally important, the *absence* of evidence. It is clear to us that the district court simply rejected - as it was entitled to do as the fact finder - the host of inferences on which her "pattern of conduct" theory of sexual harassment discrimination claim hinged. Similarly, the district court declined to draw an inference of retaliation on the scant evidence supporting that claim. At bottom, then, the district court's ultimate findings are clear and unequivocal and reflect that the district court simply did not interpret the evidence in the manner Burns hoped it would be interpreted.

A

As to the sexual harassment claim, the district court correctly identified the controlling legal principles. *See* J.A. at 636-40 (discussing, *inter alia, Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742 (1998); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998); and *Hartsell v. Duplex Prod., Inc.*, 123 F.3d 766 (4th Cir. 1997)). In light of the district court's resort to the correct legal principles, the court's ultimate findings, including its findings that: (1) "no evidence [established] that Bjorn made sexual advances to Burns," J.A. at 636; (2) "Burns experienced no overt sexual conduct by Bjorn or by any supervisors," *id.*; (3) Burns "failed to offer any evidence that the conduct of Bjorn ... occurred because of her gender," *id.* at 637; (4) the actions complained of by Burns were "sexually neutral or, at most, ambiguous," *id.* at 638; and (5) Bjorn's "conduct [did] not create

an environment that a reasonable person would find hostile or abusive," *id.* at 640, are not clearly erroneous. *See Carter*, 33 F.3d at 457 (evaluating the district court's conclusions as to the "factual sufficiency" of the evidence of employment discrimination).[6]

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[6] The Seventh Circuit has observed:

> Although it is beyond dispute that pure questions of law should be reviewed *de novo*, the existence of racial harassment in a hostile work environment involves an application of law (the standards governing the existence of racial harassment and hostile work environment discrimination) to facts (the specific discriminatory conditions alleged by the plaintiff). If the trial judge correctly states the law, then his findings as to whether the facts meet the legal standard will be disturbed only if they are clearly erroneous. Our review would be more searching if the district court has committed an error of law, including one that "infect[s] a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.
>
> Here the district judge properly understood and expressed the current legal standards for finding racial harassment in a hostile work environment. Because he did not misstate, misinterpret or misapply the law, we apply the clear error rule to his findings, for the defendant takes issue with the trial judge's view of the

Our analysis of the record leads to the same conclusion with respect to the retaliation claim. To make out a prima facie case of retaliation under Title VII, 42 U.S.C. § 20OOe-3, a plaintiff must show that (1) the plaintiff engaged in a protected activity, such as filing a complaint with the EEOC; (2) the employer took adverse action against the plaintiff, and (3) the protected activity was causally connected to the employer's adverse action. *Beall v. Abbott Labs., 130* F.3d 614, 619 (4th Cir. 1997). Once this is shown, the burden shifts to the employer to rebut the presumption of retaliation by articulating a legitimate nonretaliatory reason for the adverse action. *Id.* The plaintiff must then demonstrate that the employer's reason was mere pretext for retaliation by proving "both that the reason was false, and that discrimination was the real reason for the challenged conduct." *Id.* (internal quotation omitted).

A plaintiff may demonstrate the third requirement of a prima facie case - that the protected activity was causally related to the employer's adverse action - by showing "essentially ... that she was fired after her employer became aware that she had filed a discrimination charge." *Williams v. Cerberonics,* 871 F.2d 452,

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evidence, not with his view of the law.

Daniels v. Essex Group, Inc., 937 P.2d 1264, 1269-70 (7th Cir. 1991) (citations omitted). As in *Daniels,* in the case at bar, Burns disagrees with the district court's view of the evidence.

457 (4th Cir. 1989). Such proof, while clearly not conclusive in proving ultimate liability, certainly satisfies the less onerous burden of making a prima facie case of causality." *Id.* (showing that firing occurred three months after filing of discrimination complaint was sufficient to show causation); *see also Carter*, 33 F.3d at 460.

On November 23, 1994, Burns notified Bjorn's superior that she had been sexually harassed by Bjorn. On November 28, 1994, Burns filed a complaint with the EEOC. Three months later, on March 10, 1995, Burns was fired. The passage of time between the filing of her EEOC charge and Appellant's termination was only two weeks longer than the time held sufficient to demonstrate prima facie causation in *Cerberonics*. *See* 871 F.2d at 457.

Nevertheless, in the case at bar, the district court found that Burns "offered no evidence to support the third element of her retaliation claim. . ." J.A. at 640-41.[7] It went on to explain,

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[7] To be sure, one could read the district court's findings on this issue to suggest that the court was focused on the existence *vel non* of a prima facie case of retaliation, rather than on the ultimate question of whether Burns had adduced sufficient evidence to persuade the district court of the existence of UniNet's retaliatory motive for her termination. We are satisfied, however, particularly in light of the district court's reliance on *Carter*, which dealt expressly with a claim of retaliation under identical circumstances, that the district court did not reject the proof as failing to establish a prima facie case, but instead, ruled on the merits of the retali-

however, that where no other evidence supports a finding of retaliatory motive, the temporal proximity between the discovery [by the employer] of an EEOC charge and an employee's termination is insufficient to show a causal connection." *Id.* at 641.

The district court's factual conclusion is wholly consistent with Fourth Circuit authority. In *Cerberonics*, this Court held that "mere knowledge on the part of an employee that an employee it is about to fire has filed a discrimination charge is not sufficient evidence of retaliation to counter substantial evidence of legitimate reasons for discharging that employee." 871 F.2d at 457. Evidentiary support for the existence of UniNet's legitimate nonretaliatory motive in terminating Burns is found in evidence entered by Burns during her case-in-chief. See J.A. at 412; *see generally id.* at 464-512. Thus, even though the record in this case does not "overwhelmingly support[] the trial court's finding of no retaliation," *Cerberonics*, 871 F.2d at 457, the district court nevertheless must be affirmed under the deferential "clearly erroneous" standard of review. "[W]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. Zfass v. Commissioner, 118 F.3d, 184, 188 (4th Cir. 1997) (quoting *Anderson*, 470 U.S. at

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ation claim at the close of the plaintiff's case-in-chief, as Fed.R.Civ.P. 52 plainly authorizes.

574).[8]

V

Finally, Burns' counsel candidly admitted fault in failing to make a timely request for jury trial, *see* J.A. at 48-60 ("The frailty of human nature is neither an excuse nor a refuge, but the only accounting available."). He requested the district court to exercise its discretion under Rule 39(b) to empanel a jury. *See Malbon v. Pennsylvania Millers Mut. Ins. Co.*, 636 F.2d 936, 940 n.12 (4th Cir. 1980). We discern no abuse of discretion in the district court's denial of the motion.

VI

For the reasons set forth above, the judgment is

AFFIRMED.

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[8] In the view we take of the case, it is unnecessary to consider the issue of whether Southeastern Computer Consultants, Inc., as well as UniNet, was subject to suit under Title VII.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
May 2, 2000

No. 99-1264
CA-98-382

PATRICIA B. BURNS
Plaintiff - Appellant

V.

UNINET, INCORPORATED; SOUTHEASTERN COMPUTER CONSULTANTS, INCORPORATED
Defendants - Appellee

and

JOHN E. BJORN
Defendant

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and reheating en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

PATRICIA B. BURNS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 98-382-A**
	)	
UNINET, INC., et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants UniNet, Inc. ("UniNet" or the "Company") and Southeastern Computer Consultants, Inc. ('SCCI"), by their undersigned counsel, and pursuant to Fed. R. Civ. P. 52, hereby submit their Proposed Findings of Fact and Conclusions of Law.

I. PROPOSED FINDINGS OF FACT

A. The Parties

1. UniNet is in the business of developing, maintaining and selling integrated hardware and software

computer systems to businesses and individuals. UniNet is headquartered in Fairfax, Virginia, and has one office in Frederick, Maryland. At all times material to this case, UniNet has had fewer than 50 employees.

2. Plaintiff Patricia B. Burns ("Burns") was employed by UniNet during her first period of employment (hereinafter "First period of employment") from December 1990 through August 24, 1992 in the Herndon, Virginia office and in UniNet's Frederick, Maryland office during her second period of employment (hereinafter "second period of employment") from October 1993 through March 10, 1995.

3. SCCI is a Department of Defense government contractor that performs classified work on U.S. missile and satellite systems. SCCI is headquartered in Frederick, Maryland and has eight offices in five states. At all times material to this case, SCCI has employed fewer than 125 employees.

4. UniNet and SCCI are separate and distinct corporations. UniNet and SCCI have different shareholders (except for Leo Harris), directors, officers and employees; are engaged in separate industries (UniNet is commercial; SCCI exclusively defense contracting); maintain separate corporate records, accounting systems, bank accounts and corporate policies and procedures; file separate tax returns; employ different accountants; maintain different employee benefit programs; and have separate insurance policies. The only regular relationship between the two corporations is that SCCI processes UniNet's payroll and performs data processing and accounting services, as requested, for a fee that is regularly invoiced to and paid by

UniNet. SCCI has also purchased computer hardware and services from UniNet at a non-discounted rate.

5. John E. Bjorn ("Bjorn") is an individual who resides in Maryland and served as president of UniNet from its inception in 1990 until September 1995.

6. During her employment by UniNet, only Bjorn is alleged by Burns to have sexually harassed her, discriminated against her and retaliated against her.

7. Most of the sales representatives during each of Burns' two periods of employment with UniNet were women.

8. One of Burns' managers during her second period of employment, Pam Edelman is a woman.

9. UniNet has an equal employment opportunity policy, contained in its Employee Handbook, that prohibits sexual harassment and discrimination. See UniNet Corp. Policy No. II 2 (Defendants' Trial Exhibit 4)[1].

10. The UniNet Employee Handbook, which contains Corporate Policy No. 112, was given to Burns. Burns admits that she kept her copy of the Employee Handbook in her desk.

11. UniNet's 'Prevention of Sexual Harassment Policy" was implemented on February 5, 1993. The Policy encourages employees to report any harassment immediately to their supervisor, provides for remedial action by supervisors and unequivocally states that '[r]etaliatory action against the harassed will not be tolerated."

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[1] All references to Defendants' Joint Trial Exhibits will be abbreviated as "Def. Exhibit."

B. Burns' First Period of Employment

12. After she started her employment, Burns attended sales calls with Bjorn and Bjorn had regular involvement with Burns' sales accounts for UniNet, although Todd Heidelberger ("Heidelberger") was Burns' direct supervisor. Bjorn also assisted Burns with training and sales calls and observed her performance. With respect to her training, and on providing sales assistance for and evaluating the performance of Burns, Bjorn treated Burns the same as other sales representatives.

13. During Burns' employment with UniNet, both men and women were promoted, placed on probation, and discharged for cause.

14. Burns was promoted to senior sales representative in December 1991.

15. Burns never complained of sexual harassment, gender discrimination, or retaliation during her first period of employment with UniNet.

16. During the latter part of her first period of employment, Burns began failing or refusing to make cold calls to increase UniNet's customer base. She also failed and/or inadequately and untimely prepared Return Merchandize Authorization Forms ("RMAs") to document returned equipment for credit, which caused UniNet to lose money. Bjorn criticized and counseled Burns and others for these acts. Burns did not adhere to Bjorn's directions. Instead, she started complaining that UniNet was delaying the shipment of orders for customers designated for her. Bjorn also criticized other male and female sales representatives for not cold calling and for failing to fill out

RMAs correctly and timely.

17. Before the latter part of the first period of employment, Burns' sales were dropping.

18. Heidelberger also reported to Bjorn that Burns was complaining about company policies. Bjorn met with Burns to discuss her concerns regarding prioritization of sales orders. Burns did not tell Bjorn during this meeting that she believed that she was being sexually harassed or discriminated against or that she was being treated differently because of her gender.

19. The only complaint Burns made during her first period of employment was in approximately June 1992 to her supervisor, Heidelberger. Burns complained to Heidelberger that Bjorn was treating her harshly, that her sales were not being prioritized, that her clients were being pushed to the side, and that she was being 'mistreated.'

20. When she met with her supervisor in June 1992, Burns informed Heidelberger that "I feel like I'm being abused or harassed." Heidelberger asked Burns: "do you feel you are being sexually harassed?" Burns responded "no, more emotional harassment."

21. Bjorn treated men and women the same when enforcing UniNet policies and procedures.

22. A UniNet senior technician, Trung Le ("Le"), prepared all received orders for shipment to UniNet customers. At no time did Le receive any instructions by Bjorn or anyone else to delay, hold back, or place Burns' orders in a secondary position. Le treated Burns' orders the same as orders for all other sales representatives.

23. Burns wrote a follow-up memorandum to Heidelberger after her meeting with Bjorn that summarizes the business issues they discussed. She did not mention harassment, Def Exhibit 16, and Burns did not claim that she was singled out because of her gender.

24. Burns voluntarily resigned her employment with UniNet in August 1992. Def. Exhibit 35.

25. Burns stated to Bjorn and UniNet's Chairman Harris at the time of her voluntary departure in August 1992 that she was leaving to pursue a business venture with her then fiancee David Cook. Burns concealed her complaints about Bjorn from Bjorn and Harris.

26. During the period from August 1992 to October 1993, Burns visited UniNet to deliver printing products and services, which UniNet purchased from her fiancee's business. Bjorn approved the purchase of printing products and printing services from Burns fiancee's business. During this time, Burns did not complain about Bjorn, and Bjorn did not engage in any solicitation of Burns for a relationship, sexual or otherwise.

27. The only unwelcome conduct Burns alleges Bjorn committed during the first period of employment is the following non-sexual, harmless conduct:

- paying more attention to Burns then other women in the office;
- talking about personal, non-business topics with Burns;
- talking about his marital situation with Burns;
- laughing and joking around with Burns;

- hanging around Burns' desk "all the time"; and
- gazing at Burns' legs when he approached Burns to talk with her.

Bjorn did not engage in any of this conduct.

28. Bjorn did not ask Burns for sex or a date.

29. Bjorn never touched Burns except for one occasion in 1991 during a sales call when Bjorn put his hand behind Burns' back to guide her while they were crossing a busy street in the District of Columbia, removing his arm once they reached the curb on the other side. Bjorn never touched any private part of Burns. Bjorn never kissed Burns or attempted to kiss her or hold her hand, and he never made any comments of a sexual nature or comments regarding body parts to Burns.

30. During Burns' first period of employment with UniNet, groups of UniNet employees occasionally gathered after work for happy hour at a local restaurant. Bjorn rarely attended such happy hours and seldom asked other employees to attend.

31. On one occasion in early 1991, both Burns and Bjorn attended a happy hour. Although several UniNet employees were invited by others to attend the after-work happy hour, no other UniNet employees attended. Both Burns and Bjorn had drinks and discussed business and personal (non-sexual) issues. After finishing their drinks, Burns and Bjorn each departed from the restaurant alone.

32. Bjorn never made any sexual comments to Burns or comments to any person that he and Burns were having an affair. Burns never indicated that any of Bjorn's conduct toward her was unwelcome.

33. Another employee in the Herndon office of UniNet, Maureen Kearns ("Kearns"), initiated personal conversations with Bjorn. Bjorn did not spend a disproportionate amount of time around Kearns or take any action to initiate a sexual relationship with her.

34. Another employee, Susan Foreman Temple ("Temple"), leaned into Bjorn's car in a parking lot and kissed him after Bjorn and Temple had been drinking heavily after work. Bjorn never asked Temple for sex and never asked Temple out on a date, and he did not engage in any unwelcome conduct toward her.

35. Bjorn never touched Temple in an unwelcome manner.

36. Neither Kearns nor Temple ever complained during her respective employment that she was sexually harassed by Bjorn, or that any of Bjorn's conduct was unwelcome.

37. Other than Burns, no woman employed at UniNet complained that she was sexually harassed by Bjorn or that she suffered any unwelcome sexual conduct by Bjorn.

C. Burns' Second Period of Employment

38. Fourteen months later, in October 1993, Burns voluntarily expressed interest in returning to work for UniNet to Todd Heidelberger.

39. On October 24, 1993, Burns was rehired by UniNet as a senior sales representative and assigned to the Frederick, Maryland office of UniNet.

40. During the period prior to Burns' reemployment, Bjorn hired Nancy Mossburg as UniNet's accountant, and shortly

thereafter Karen Biesemeyer as UniNet's purchasing agent. Because sales were growing, UniNet needed professional administrative help with cash flow and equipment order problems. Bjorn, Mossburg and Biesemeyer centralized the ordering process. Prior to Biesemeyer's hire, all sales representatives placed their orders for new equipment directly with vendors. As sales grew, the unconsolidated ordering became confusing and difficult to maintain profitably. After Biesemeyer was hired, all UniNet sales representatives were prohibited from placing orders for equipment with vendors. The sales representatives were directed to transmit orders to Biesemeyer for consolidation and placement with vendors.

41. By memorandum dated June 27, 1994, (Def. Exhibit 41), sales representatives were informed that purchasing would no longer accept orders with a required delivery date of less than five business days. Additionally, sales representatives were informed that there would be no exceptions to this purchasing policy and that any special orders required approval by a sales manager.

42. Burns immediately challenged this new purchasing policy. By memorandum dated June 29, 1994, Burns openly questioned the new policy and complained that the new policy would result in lost revenue for UniNet and lost income for Burns. Def Exhibit 16.

43. Burns challenged UniNet's established purchasing policies and frequently sought exceptions to the policies for her orders. By memorandum dated June 30, 1994, Burns sought an exception to the 60 day policy for an order placed by Loudoun

Hospital. Def Exhibit 16. By memorandum dated December 9, 1994, Burns sought an exception to the 60 day policy for another order placed by Loudoun Hospital. Id. Burns complained about the 60 day policy, the five day rule, and sought exceptions to the established purchasing policies for orders placed by Loudoun Hospital, Mnemonic Systems and Trans Tech in her memoranda dated January 13, 1995; January 16, 1995 (2 memos); January 18, 1995; January 20, 1995 (3 memos); January 24, 1995; and March 7, 1995. Id. Burns' challenges to these policies became more frequent, open and defiant as her employment progressed.

44. During the entire second period of employment of Burns, UniNet experienced cash flow difficulties. It had trouble paying for equipment it ordered as a result of orders placed with UniNet by its customers. Occasionally, vendors held orders for UniNet's equipment until UniNet paid current balances. On a daily basis, Biesemeyer obtained information from sales managers Donna Gavitt, Todd Heidelberger and John Lyons as to those UniNet customers who needed orders shipped immediately, and Mossburg released funds to vendors so that such equipment could be shipped.

45. At no time did Bjorn direct that Burns be singled out for unfavorable treatment in the ordering or delivery process. Neither Mossburg nor Biesemeyer held up orders for Burns' customers, and Mossburg treated Burns and customers assigned to Burns the same as other sales representatives.

46. At the end of the initial six month period, Burns requested that her base salary of $25,000 be continued an additional six months. Def. Exhibit 16. Burns requested the

extension of enhanced salary from Chairman Harris in violation of UniNet's chain of command. Burns did not address the salary extension with her immediate supervisor or with Bjorn.

47. UniNet, through Bjorn, granted Burns' request for an extension of her base salary.

48. Burns reported to Todd Heidelberger in October 1993. Heidelberger continued as Burns' immediate supervisor until his departure from the company in March 1994. Prior to March 1994, Bjorn had little direct contact with Burns, except for sales meetings.

49. Bjorn and the sales managers, Heidelberger, Gavitt and Lyons, divided up UniNet's sales territory around the Frederick and Herndon offices. The Herndon office included Virginia and the District of Columbia. The Frederick office divided Maryland. Burns was aware of the division when she became reemployed. Despite the knowledge, Burns continued to attempt to call on customers in D.C. and refused to accept the division prescribed by management.

50. UniNet hired additional sales help in Frederick (Michael McLane and Allen Shirey) and it divided the Frederick territory around the sales representatives in accordance with their wishes. Burns demanded the most lucrative territory in Maryland (Rockville), leaving the other sales representatives with little or no productive territory. Burns further complained whenever another sales representative contacted a potential new customer in her territory. However, she did little or no cold calling herself to increase the amount of customers in her territory.

51. After Heidelberger resigned in March 1994, Bjorn

invited Burns to apply and interview for the position of Frederick Branch Manager.

52. Burns declined to apply for the branch manager position and Bjorn hired Pam Edelman, a female, to fill the position. Thereafter, Burns reported directly to Edelman.

53. When Heidelberger left UniNet in March 1994, Burns requested management to assign her to the Loudoun Hospital account, which she had handled during her first period of employment in the Herndon, Virginia office.

54. The Loudoun Hospital account was a large UniNet sales account. Loudoun Hospital was also a slow payer that consistently allowed its invoices to remain unpaid for more than 60 days and often more than 90 days.

55. UniNet granted Burns' request and assigned her the Loudoun Hospital account, even though that account should have been assigned to sales personnel in UniNet's Herndon office.

56. UniNet and Bjorn extended special benefits and opportunities to Burns during her second period of employment with UniNet, including:

A. Burns requested and was granted enhanced base salary for one year;

B. Burns requested and was granted an exception from UniNet's standard "90 Day Rule" in May and June 1994 so that additional commissions could be earned by Burns on accounts that were more than 90 days past due; and

C. Burns requested and was granted an exception from UniNet's standard "60 Day Rule' in January 1995 so that sales orders for her customers were processed even if those

customers' accounts were 60 days past due.

57. In her April 15, 1994 memorandum to Bjorn seeking an extension of her enhanced base salary, Burns alternatively requested a transfer to the Herndon, Virginia office. If her request had been granted, Burns would have worked in close proximity to Bjorn at Herndon.

58. Immediately before her enhanced salary extension expired in September 1994, Burns made a second enhanced salary extension request to her immediate supervisor, Pam Edelman. Claiming that Bjorn had not responded to the request, Burns took her request to Chairman Harris. UniNet denied Burns' second request for an extension in October 1994.

59. Long before filing her EEOC: charge in November 1994, Burns began complaining about UniNet policies and procedures both verbally and in writing through a series of memos. Def Exhibit 16. Burns most frequently complained that she and other sales representatives were prohibited from calling Biesemeyer and Mossburg to lobby for orders and speed up shipping. Biesemeyer and Mossburg had directed that sales representatives contact them through their managers to reduce the amount of time spent dealing with requests for information. This direction applied to all sales representatives, not just Burns. Burns, however, refused to accept this and intensified her complaints.

60. Following UniNet's denial of her second enhanced salary extension request in October 1994, Burns wrote 24 memos detailing her complaints about UniNet's policies and procedures. Def. Exhibit 12.

61. On November 18, 1994, Bjorn attended a monthly sales meeting in the Frederick office with Pam Edelman. After the meeting, Burns, and the other Frederick sales representatives, Mike McLane and Allen Shirey, requested to meet with Bjorn. Burns attempted to bait Bjorn during the meeting to get him to state that he was unfair to the Frederick office. Burns chose this meeting to air her many complaints and to challenge the policies Bjorn, Biesemeyer and Mossburg had put into place. She was openly critical of Bjorn. None of her complaints related to harassment or gender discrimination. Burns tape-recorded the meeting without Bjorn's knowledge or consent. Burns testified during her deposition that she later destroyed the tape.

62. At the meeting, Burns contended that many Frederick office sales orders were being placed behind Herndon office sales orders, causing delays in delivery of products to Frederick office customers.

63. After the November 18, 1994 meeting in the Frederick office, Bjorn promptly performed a comparative study of sales orders placed by sales representatives in the Frederick and Herndon offices of UniNet. Def. Exhibit 27.

64. The results of Bjorn's informal study show that there was a one-day difference between Frederick and Herndon in terms of the average number of days for a product to be shipped from a vendor. The same time frame applied to all sales employees working in Frederick, including Burns.

65. When her complaints about shipping and order policies were rejected by Bjorn and/or demonstrated to be groundless, Burns escalated her complaints by focusing on Bjorn

instead of UniNet's policies and procedures. On November 23, 1994, Burns wrote a complaint memo claiming for the first time that she had been subject to "harassment" by Bjorn "over approximately the last six months." Def. Exhibit 14.

66. Burns' November 23, 1994 memorandum makes no reference to sexual harassment or her rejection of alleged "flirtations" during Burns' first period of employment with UniNet in 1991-92. The memorandum does not allege any retaliatory conduct by Bjorn or that Bjorn was treating Burns differently because of her gender.

67. Burns sent her November 23, 1994 memo to Bjorn and copied SCCI's President, Edward Bjorn. Ed Bjorn and SCCI's human resources manager, Lorie Morrell, immediately met with Burns to discuss the concerns raised in her memorandum. The meeting was attended by Ed Bjorn, Pam Edelman, Lorie Morrell and Burns in SCCI's Frederick office. Harris was unable to attend the meeting due to a scheduling conflict and he requested that Ed Bjorn and Lorie Morrell represent him at the meeting.

68. During the November 23, 1994 meeting, Burns stated for the first time that the "harassment" alleged in her memorandum related to Bjorn's alleged "flirtations" and her rejection of those "flirtations" during her first period of employment with UniNet years earlier in 1991 and 1992. She did not identify any sexual conduct or "flirtation" that had occurred since UniNet had reemployed her in October 1993.

69. At the conclusion of the meeting, Burns was advised to avoid personal contact, except when necessary, with Bjorn. Morrell instructed Bjorn similarly with respect to

communicating with Burns.

70. Harris ultimately asked Morrell to conduct and oversee an investigation of Burns, complaint of harassment to ensure that an objective and impartial investigation of UniNet's president was conducted. Five days later, UniNet received Burns' first EEOC charge. Morrell immediately met with Burns. During that meeting, Burns claimed for the first time that Bjorn had engaged in sexual harassment.

71. After Burns filed her EEOC charge, she intensified her written and verbal complaints about UniNet's policies. Her chief complaints related to delays in the ordering and delivery of products for her customers. During the time period from November 1994 until her March 1995 discharge, she frequently involved UniNet and SCCI personnel who had little to do with the policies. Her complaints interfered with her supervisor's performance of her job, and contributed to the poor management and sales performance of the Frederick office.

72. By memorandum dated January 26, 1995, Burns was warned by her immediate supervisor, Pam Edelman, that she, like all sales representatives, was "not permitted to call Nancy [Mossburg] to check on the status of orders." Def. Exhibit 23. Burns disregarded this warning and violated this established policy by attempting to contact Mossburg to check on the status of her orders.

73. Burns regularly contacted Beisemeyer, without sales manager approval or knowledge, to seek exceptions to established purchasing policies. On one occasion, Burns called Beisemeyer so many times to seek approval of a special order that

Bjorn instructed Beisemeyer not to accept any more calls from Burns that day so that Beisemeyer could perform her regular purchasing duties.

74. By written memorandum dated December 5, 1994, Burns was warned by her immediate supervisor, Pam Edelman, that she was setting unrealistic expectations for customers for delivery of products and that she was mismanaging her time by writing memos and wasting her time. Def. Exhibit 26. Burns' memo writing increased after she received this warning from her supervisor.

75. John Lyons became branch manager of the UniNet Frederick office in December 1994. Lyons redefined the Frederick sales territory because he observed that Burns had been allowed to take the only lucrative territory (1-270 corridor). He allowed Burns to keep a lucrative part of the Rockville projects and gave other 1-270 technical areas to McLane because his previous territories (Hagerstown and Frederick) had little or no businesses located in them. Upon dividing the territory, Lyons allowed all sales representatives to retain customers they already had established, regardless of territory. Burns did not lose any customers because of this division.

76. Throughout the fall of 1994 and early 1995, the sales of the Frederick office were poor. The office was losing money and relied on financial support from the Herndon operations. In addition to directing that more cold calls be made to more businesses, Bjorn also consolidated some shipping and built-out tasks in Herndon where UniNet had more experienced and qualified technical representatives.

77. Bjorn, Edelman, and later Lyons, all warned the sales representatives in Frederick that their sales needed to increase. Burns was instructed by Bjorn to stop complaining about policies and make sales. Bjorn had already counseled Burns that her sales profit margins were the lowest in the company.

78. On February 1, 1995, Lyons placed Burns, McLane, and Shirey on probation for failure to meet sales quotas. Burns had failed to meet her sales quota in 9 out of the preceding 12 months, her margins were very low, and her constant complaining interfered with her ability to sell. In the probation notice, Lyons specifically warned Burns that the complaints against UniNet policies were to cease and that she was to follow UniNet policies. Burns challenged Lyons and threatened to ignore his instructions.

79. After being placed on probation Burns requested that her probation be reconsidered. Burns also requested that a sale processed after the standard 90 day period for calculation of sales quotas be considered processed during the 90 day period.

80. Burns stated in her request for reconsideration of her probation that she was unaware of the cut-off date for the 90 day sales period. In fact, she was aware of that date. In December 1994, Burns specifically confirmed that the cut-off date for the current 90 day sales period was January 31, 1995. Notwithstanding this fact, UniNet granted Burns's request and removed Burns from probation in February 1995. However, in the notice removing her from probation, Lyons specifically directed and Burns acknowledged that she was being told to cease complaining about UniNet's sales and order policies and to start

selling.

81. In addition to the period of written or formal probation, Burns was placed on informal or verbal probation by Chairman Harris. During two separate meetings in January and February 1995, Harris informed Burns that she was at risk of losing her employment. Harris informed Burns that Burns needed to improve in four areas to keep her job; she had to: (1) follow management's guidelines; (2) follow UniNet's policies; (3) get her sales up to what was expected; and (4) be more positive with clients.

82. Despite being warned by Lyons and Harris both verbally and in writing, Burns continued to complain about UniNet policies. She complained that Bjorn was going to visit her chief customer, Loudoun Hospital, despite the fact that she knew Harris had instructed Burns to visit large accounts. When Harris told Burns of that fact and directed that she accept his instructions, Burns continued to complain about it. Burns also complained about an expense deduction from her paycheck shipping a product which she previously said she would pay for personally. When she did not receive payment, she called SCCI personnel out of the chain of command, complained, and demanded payment.

83. On March 9, 1995, Burns left work without notice. She walked out after her supervisor had left the office and claims to have faxed a note to Bjorn and SCCI President, Ed Bjorn, further complaining about decisions and actions of UniNet. Harris reviewed the notice and concluded that Burns had resigned employment. He further decided that if Burns returned to work, she would be discharged because she had disobeyed a continuing

order to abide by UniNet decisions and policies despite repeated warnings.

84. On March 10, 1995, UniNet discharged Burns for failure to perform in accordance with UniNet's policies, procedures, and management guidelines. Def Exhibit 3.

85. UniNet's discharge of Burns was based upon legitimate business reasons.

86. UniNet's discharge of Burns was not based upon any retaliatory or improper motive.

87. Burns' filing of her EEOC charge in November 1994 was not a motivating factor in UniNet's decision to discharge Burns on March 10, 1995.

88. Burns' discharge on March 10, 1995 is the only adverse employment action suffered by Burns.

89. Prior to her discharge from UniNet and continuing through her subsequent employment at Loudoun Computer Services, Burns experienced physiological conditions that regularly affected her stress level and anxiety condition. These physical/physiological conditions were unrelated to her conditions or terms of employment.

90. Following her discharge from UniNet on March 10, 1995, Burns searched for new employment in the computer sales industry. In April-May, 1995 Burns interviewed for sales positions at several computer companies, including Computer Associates, CMS and Altair Associates. Burns turned down an offer of employment from CMS. Burns submitted an oral counteroffer of employment to CMS. Burns' oral counteroffer was rejected by CMS. Altair Associates asked Burns to make a

written proposal on her terms of employment. Burns refused or failed to submit any proposal for her terms of employment with Altair.

91. Burns was hired by Loudoun Computer Services ("Loudoun Computer") in August 1995 as a sales representative. Burns was employed as a sales representative with Loudoun Computer horn August 1995 through December 1997. Burns earned $43,409 in 1994, $33,557 in 1995 ($11,093.15 from UniNet; $22,557.00 from Loudoun Computer), $78,106.00 in 1996 (Loudoun Computer) and $46,141.00 in 1997 (Loudoun Computer).

92. Burns was discharged by Loudoun Computer in December 1997. Burns requested that she be permitted to work from home full time. Loudoun Computer denied her request and required her to return to work. When Burns failed or refused to return to work, Loudoun Computer terminated her employment. Burns request to work from home full-time was unreasonable. Loudoun Computer's refusal to allow Burns to work from home full-time was reasonable.

93. Burns filed a discrimination charge against Loudoun Computer after her discharge in December 1997. She withdrew the charge of discrimination without prejudice.

94. Burns has not sought employment since December 1997. Burns stated reasons for not seeking employment since her discharge in December 1997 include stress, the need to care for her mother and her inability to seek new employment, which she alleges resulted from her work experience at UniNet.

95. Burns claims she is unable to seek employment of

any kind until January 1, 2000.

96. Burns' refusal to seek employment of any kind since December 1997 is unreasonable. Buns has failed to make reasonable efforts to find other suitable employment since December 1997.

97. Burns refused or failed to comply with the terms of her employment with Loudoun Computer in December 1997. Loudoun Computer did not impose unreasonable working conditions on Burns when they required her to report to work on a regular basis. Burns failed to use reasonable diligence to maintain her employment with Loudoun Computer.

II. PROPOSED CONCLUSIONS OF LAW

A. Count I of the Complaint

1. In Count I of her Complaint, Burns claims that Defendants UniNet and SCCI engaged in quid pro quo sexual harassment. Complaint ¶¶ 60-65.

2. Quid pro quo sexual harassment occurs when an employer conditions, explicitly or implicitly, the receipt of a job benefit or tangible job detriment on the employee's acceptance or rejection of sexual advances." Reinhold v. Commonwealth of Virginia, 135 F.3d 920, 931 (4th Cir. 1998), citing Spencer v. General Elec. Co., 894 F.2d 651, 658 (4th Cir. 1990) (emphasis added). Bjorn did not make sexual advances to Burns. Burns admits that she experienced no overt sexual conduct by Bjorn or any of her supervisors. Burns admits that Bjorn never asked her on a date, never asked her for sex, never touched her inappropriately, and never made sexual comments to her or anyone else at UniNet. Therefore, the receipt of a job benefit or

a tangible job detriment was never conditioned upon Burns' acceptance or rejection of sexual advances. Reinhold, 135 F.3d at 931.

3. As the Supreme Court recently determined, quid pro quo sexual harassment occurs when an employer demand[s] sexual favors from an employee in return for a job benefit. Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2264 (1998) (emphasis added). Bjorn did not demand sexual favors from Burns in return for a job benefit. No evidence of any demand for sexual favors of any kind exists in this case.

4. Burns' own conduct contradicts her allegation that Bjorn made demands for sexual favors in return for a job benefit. Ellerth, 118 S. Ct. at 2264. Despite her general allegations of "flirtations" by Bjorn during her initial period of employment in 1991-92, Burns returned to work for UniNet in October 1993 and twice requested a transfer to the Virginia office where Bjorn worked. Accordingly, Burns has not established by a preponderance of the evidence that Defendants engaged in quid pro quo sexual harassment and Defendants are entitled to judgment under Count 1.

5. To establish a claim for hostile work environment sexual harassment, a plaintiff (1) "must prove that [s]he was harassed 'because' of [her] 'sex'; (2) that tile harassment was unwelcome; 3) that the harassment was sufficiently severe or pervasive to create an abusive working environment; and (4) that some basis exists for imputing liability to the employer." Wrightson v. Pizza Hut of America, Inc., 99 F.3d 138, 142 (4th Cir. 1996); Spicer v. Commonwealth of Virginia, 66 F.3d 705,

710 (4th Cir. 1995).[2]

6. Burns must prove an essential element "of causation: the harassment or other conduct allegedly occurred because of the victim's gender." Tietgen v. Brown's Westminster Motors, Inc., 921 F. Supp. 1495, 1501 (E.D. Va. 1996) (emphasis in original). Harassing conduct that is "sexually neutral or, at most, ambiguous," is not "within the reach of Title VII." Tietgen, 921 F. Supp. at 1501, quoting Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 753 (4th Cir. 1996). Burns has failed to offer any evidence that the conduct of Bjorn or any other action of UniNet or SCCI occurred because of her gender. The conduct complained of -- paying attention to Burns, discussing personal matters with Burns, providing sales assistance to Burns, asking Burns to attend office happy hours, joking around with Burns, discussing his marriage with Burns and alleging retaliation against Burns is "sexually neutral or, at most, ambiguous." See, e.g., Hopkins, 77 F.3d at 753 (causation element not satisfied by supervisor who stares at employee in bathroom, kisses employee at receiving line at his wedding and bumps into employee); McWilliams v. Fairfax Board of Supervisors, 72 F.3d 1191, 1193 (4th Cir. 1996) (offensive teasing and jokes are sexually neutral and, therefore, not actionable conduct). Burns has failed to prove by a preponderance of the evidence that UniNet or SCCI took any

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[2] Following the Supreme Court's ruling in Burlington Indus., Inc. v. Ellerth, supra the Court does not need to consider the fourth prong.

action or retaliated against her or harassed her because of her gender. There is no evidence that any of the business policy or practices of UniNet were created, administrated or enforced with respect to Burns because of her gender. To the contrary, the business policies and practices of UniNet were enforced equally without regard to gender.

B. Count II of the Complaint

7. In Count II of her Complaint, Burns alleges that UniNet and SCCI violated Title VII by permitting a hostile environment with respect to her gender.

8. For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986). Relief is unavailable where the alleged conduct "is not severe or pervasive enough to create an objectively hostile or abusive work environment." Harris v. Forklift Sys., Inc. 510 U.S. 17, 21 (1993)

9. The Supreme Court rejected any sweeping expansion of the hostile work environment standard:

> And there is another requirement that prevents Title VII from expanding into a general civility code.... The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the 'conditions" of the victim's employment. Conduct that is not severe or Pervasive enough to create an objectively hostile or abusive work environment --

> an environment that a reasonable person would find hostile or abusive -- is beyond Title VII's cases.

Oncale v. Sundowner Offshore Services, Inc., 118 S.Ct. 998 (1998) (citations omitted) (emphasis added). Accordingly, courts have confirmed the scope of actionable conduct to be that which is so objectively offensive as to alter the conditions of the plaintiff's employment. See, e.g., Hartsell v. Duplex Products, Inc., 123 F.3d 766 (4th Cir. 1997) (insensitive and demeaning comments by supervisor did not establish a severe or pervasive abusive environment); Spicer v. Commonwealth of Virginia, 66 F.3d 705 (4th Cir. 1995) (public memo about plaintiffs nipples considered severe and pervasive); Swain v. Roadway Express, 71 FEP Cases (BNA) 71, 73-74 (D. Md. 1996) (reasonable jury could find sexual harassment based on plaintiffs allegations that her co-workers had touched her in an inappropriate and threatening manner).

10. In assessing whether the work environment rises to the level of "severe and pervasive," a court must look to the totality of the circumstances including:

> the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it reasonably interferes with an employee's work performance.

Beardsly v. Webb, 30 F.3d 524, 529 (4th Cir. 1994), quoting, Harris v. Forklift Sys., 114 S. Ct. 367, 371 (1993). Further, the court may not view the behavior in a vacuum, but must give

"careful consideration of the social context in which the particular behavior occurs and is experienced by its target." Oncale v. Sundowner Offshore Services, Inc., 118 S.Ct. at 1003 (recognizing that a coach's patting the behind of a football player is different than an office setting).

11. Burns alleges that Bjorn harassed her because of her gender by asking her to attend after work office happy hours, which other employees were invited to attend, and by flirting with her, and retaliating against her when she allegedly rejected the flirtation. Such conduct does not create "an environment that a reasonable person would find hostile or abusive." Harris, 510 U.S. at 21. Moreover, there is no evidence that Burns gave any indication that the conduct was unwelcome.

12. Burns' claim of hostile environment sexual harassment also relates to the business policies and practices of UniNet. Burns claims that UniNet promulgated, administered and enforced some of its sales, ordering and shipping policies and practices to her detriment because of her gender. The sales and shipping policies and practices of UniNet are legitimate business policies and practices and Defendants have articulated legitimate business reasons for their promulgation, administration and enforcement.

13. Burns must produce evidence that her gender was the reason for Defendants' actions. She has not done so. There is ample evidence in the record that UniNet created, administered and enforced its policies and practices without regard to gender.

14. Just as Burns is unable to present sufficient evidence of sexual harassment against her, she fails to present any

evidence of a pattern of sexual harassment by Bjorn. Burns alleges that Bjorn selected first herself, then Temple, and then Kearns, as "targets" of his "flirtations" during 1991-92.[3] According to Burns' theory, once his "flirtations" were rejected, Bjorn began retaliating against each of me thee women. Complaint at ¶¶ 18-26. The evidence refutes these allegations. First, the record is devoid of any evidence that Bjorn sexually harassed Burns, Temple, or Kearns. Harris, 510 U.S. at 21-22 (requiring severe and pervasive conduct that creates an objectively hostile or abusive work environment). Both Temple and Kearns admit that they initiated the conduct or conversations with Bjorn that Burns alleges were unwelcome advances. Finally, neither Temple nor Kearns offered any evidence of discrimination or retaliation by Bjorn.[4] Temple admitted that she quit working at UniNet while she was on probation for poor performance. Kearns voluntarily resigned after a poor sales performance review with management. Such evidence does not demonstrate an objectively hostile or abusive workplace under the current standard

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[3] By Burns' own terms, the alleged pattern, at most, is an alleged pattern of "flirtation," not sexual harassment.

[4] Such testimony from co-workers may not even be admissible at trial to support Burns'claims. See Beyda v. Los Angeles, Daily Labor Report (BNA) (Cal. Ct. App. July 9, 1998) ("evidence of harassment of others, and of a plaintiff's awareness of that harassment is subject to the limitations of the hearsay rule" making them admissible at trial only if the plaintiff was present at the time the incidents occurred).

established in Oncale.

15. To pursue her claims, Burns must have filed a complaint with the EEOC within 180 days of the incident, or within 300 days of the incident if state or local proceedings are initiated. 42 U.S.C. § 2000e-5(e)(1). "Incidents outside of the statutory window are time-barred unless they can be related to a timely incident as a 'series of separate but related acts' amounting to a continuing violation." Beall v. Abbott Lab, 130 F.3d 614, 620 (4th Cir. 1997), quoting Jenkins v. Home Ins. Co., 635 F.2d 310, 312 (4th Cir. 1980) (per curiam).

16. All of Burns' claims, except the one for retaliation, are time-barred. Burns filed her initial EEOC complaint for "sex discrimination (sexual harassment)" on November 28, 1994. Except for the one conversation with Bjorn that Burns alleges took place at the Frederick office copy machine sometime after March 1994, all incidents of alleged sexual harassment and discrimination occurred during Burns' first period of employment with UniNet in 1991-92. Burns has testified that she believes that she was being harassed, discriminated against and forced to work in a hostile work environment during her initial period of employment in 1991- 92. These incidents occurred more than two years before Burns filed her initial EEOC charge on November 28, 1994. Moreover, these alleged incidents occurred before Burns voluntarily resigned from UniNet in August 1992. All alleged incidents occurring during Burns' first period of employment period are therefore time-barred.

17. The only alleged incident that arguably occurred during the 300 days prior to November 28, 1994 is the

conversation between Burns and Bjorn at the copier, which took place according to Burns after Heidelberger left in March 1994. More than any of the alleged incidents, this harmless conversation (during which Burns alleges Bjorn informed her that he had separated from his wife) falls far short of any evidence of sexual harassment or discrimination. Hartsell, 123 F.3d at 772; Reinhold, 135 F.3d at 931; Green v. Fairfax County School Board, 832 F. Supp. 1032,1039 (ED. Va. 1993) aff'd, 23 F.3d 400 (4" Cir. 1994).

18. Consequently, Burns "cannot rely on time-barred events under the 'continuing violation' theory because no timely violation has been alleged." Beall, 130 F.3d at 621, citing Woodward v. Lehman, 717 F.2d 909, 915 (4th Cir. 1983) (continuing violation theory available "only where an actual violation has occurred within that requisite time period") (emphasis in original). Furthermore, Burns has no ability to allege a "continuing violation" because her employment with UniNet did not continue after these alleged incidents. As such, Burns' claim of sexual harassment are time-barred and must be dismissed.

C. Count IV of the Complaint[5]

19. To prove her claim of retaliation, Burns must show that (1) she engaged in a protected activity, such as filing a complaint with the EEOC; (2) UniNet acted adversely against her; and (3) the protected activity was causally connected to UniNet's adverse action. Carter v. Ball, 33 F.3d 450, 460 (4th Cir. 1994).

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[5] The court has grated Defendants' Motion for Summary Judgment as to Count III, sex discrimination.

Burns has demonstrated that she has met the two elements of proof, she filed an EEOC charge and UniNet discharged her. However, Burns has offered no evidence to support the third element of her retaliation claim.

20. Where no other evidence supports a finding of retaliatory motive, the temporal proximity between the discovery of an EEOC charge and an employee's termination is insufficient to show a causal connection. Mathis v. Perry, 996 F. Supp. 503 (E.D. Va. 1997), citing Cooper v. City of North Olmstead, 795 F.2d 1265, 1272 (6th Cir. 1986) (finding that plaintiff s discharge four months after filing discrimination claim did not support inference of retaliation); Verbanic v. Veco, Inc., 1991 WL 23467 (9th Cir. 1991) (given lack of other evidence of retaliation, proximity of five or six weeks did not justify inference of retaliation in discharge case). Because she has not offered any evidence of retaliatory motive, Burns' claim of retaliation fails.

21. Even assuming that Burns could demonstrate that retaliation was a motivating factor for her discharge, UniNet need only articulate a legitimate non-retaliatory explanation for its decision to terminate her employment. Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985) It has done so. Burns consistently complained about and refused or was unable to comply with UniNet's established policies and procedures for sales representatives and she left work stating that she could not work at UniNet. These complaints increased dramatically following UniNet's denial of her second salary extension request in October 1994. In addition, Burns' sales performance had declined by early 1995. Moreover, Burns admitted on her last full day of

employment that she was unable to perform her job based upon a "lack of motivation." These undisputed facts establish a legitimate non-retaliatory explanation for UniNet's decision to discharge Burns. See Ennis v. Nat'l Assoc. of bus. & Educ. Radio, Inc., 59 F.3d 55 (4th Cir. 1995) (filing EEOC charge or fact employee is member of protected class does not excuse misconduct or immunize employee from discipline); see also Mathis, supra at 519 n.39 (summary judgment in favor of employer on retaliation claim based upon insubordination of plaintiff, employee cannot "set her own work terms").

22. One incident exemplifies Burns' insubordination. In early 1995, UniNet's Chairman directed UniNet's president, Bjorn, to call on UniNet's four or five biggest accounts, which included Loudoun Hospital, to demonstrate the company's continued commitment to their needs. In response to Burns' complaint memo regarding Bjorn's contacts with Loudoun Hospital, UniNet's Chairman, Harris, visited Burns at the Frederick office to explain he had directed Bjorn to contact Loudoun Hospital and UniNet's other largest customers. Harris also explained why it was advantageous to all sales people for management to ensure that UniNet's customers were satisfied and that all customers, especially the largest ones, could call on the president of the company. Harris specifically told Burns that this "was an important function for a president of the company to do." Despite this explanation from UniNet's Chairman, two weeks later Burns wrote another memo complaining again about Bjorn's contacts with Loudoun Hospital. See Def. Exhibit 16. This second memo demonstrates Burns' inability and unwillingness to

follow UniNet procedures and management directives, even after Harris explained them to her and instructed her to follow them. Insubordinate conduct like this establishes UniNet's legitimate business reasons for discharging Burns.

23. Having established a legitimate, non-retaliatory basis for her termination, the burden then shifts to Burns to prove by admissible evidence that UniNet's stated reasons are a pretext for retaliation. Ross, 759 F.2d at 356. To prove pretext, Burns must show that the reasons given for her termination are false, and that discrimination was the real motivating factor. Moreover it is not sufficient for Burns to produce evidence that reasonable minds might differ as to whether she was justifiably terminated. She must introduce evidence that affirmatively shows that her alleged complaint of discrimination was a factor in the discharge. See Tarivo v. Southeriand Corp., 68 FEP Cases (BNA) 1406, 1409 (D. Md. 1995).

24. Burns' only explanation is her subjective belief that she was adequately performing her duties as a senior sales representative. Merely refuting the employer's reasons does not meet the standard of showing the true motivating factor to be retaliation. See Jimenez, 57 F.3d at 383 ('The crucial issue in a Title VII action is an unlawfully discriminatory motive for a defendant's conduct, not the wisdom or folly of its business judgment"); Hoeppner v. Crotened Mountain Rehab. Ctr., 31 F.3d 9 (1st Cir. 1994).

D. SCCI And UniNet Are Not A Single Employer

25. Burns has also claimed that SCCI is liable because it is a single employer within UniNet. For SCCI to be liable for

the claims alleged in the Complaint, Burns must present sufficient evidence that SCCI was her employer. SCCI was not Burns' employer because it did not "control the [UniNet's] employment decisions or so completely dominate [UniNet] that the two corporations are the same entity." Johnson v. Flowers Indus., Inc., 814 F.2d 978, 980 (4th Cir. 1987)[6]. Courts will peer behind the corporate veil "only in extraordinary circumstances" and if the parent dominates the subsidiary "to the extent that the subservient corporation manifests no separate corporate interest of its own and functions solely to achieve the purposes of the dominant corporation." Johnson, 814 F.2d at 98 1, quoting, Krivo Indus. Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098, 1106 (5th Cir. 1973). Under this authority, Burns must produce admissible evidence to establish that SCCI was her employer. Burns fails to satisfy this burden.

26. In an employment context, a parent corporation can be the employer of a subsidiary's workers if it exercises excessive control in one of two ways:

First, the parent could control the employment

---

[6] SCCI is neither the parent corporation of UniNet nor an affiliated corporation of UniNet. SCCI and UniNet have only one common shareholder, Leo Harris; the two companies have regular business dealings, for which both corporations invoiced and paid at a non-discounted rate. Therefore, the standard enunciated by the Fourth Circuit for ingle employer liability in the "parent-subsidiary" relationship should be even more strictly applied in the present case.

> practices and decisions of the subsidiary. If the parent company hired and fired the subsidiary employees, routinely shifted them between the two companies, and supervised their daily operations, it would be hard to find that the parent was not their employer. Second, the parent might so dominate the subsidiary's operations that the parent and the subsidiary are one entity and thus one employer. For example, the subsidiary may be highly integrated with the parent's business operations, as evidenced by the commingling of funds and assets, the use of the same work force and business offices for both corporations, and the severe undercapitalization of the subsidiary. The parent might also fail to observe such basic corporate formalities as keeping separate books and holding separate shareholder and board meetings.

Johnson, 814 F.2d at 981. The evidence establishes that SCCI neither controlled the employment practices and decisions of UniNet nor dominated UniNet's operations so that the companies "are one entity and thus one employer."

27. The evidence demonstrates that SCCI and UniNet are separate corporations, maintain separate corporate structures, are involved in entirely different fields of business, maintain separate bank account, corporate records and accounting systems, do not share employees, maintain separate employment practices and structures, and maintain separate business offices in different

states. Although UniNet's chairman, Harris, appointed Morrell to conduct the independent investigation of Burns' charge of harassment, neither Morrell nor SCCI had any control or dominance of UniNet's employment practices and policies. While Harris also asked Edward Bjorn to attend meetings on his behalf regarding the investigation, neither Edward Bjorn nor SCCI had any role in the decision to discharge Burns. Burns' immediate supervisor, John Lyons, made the decision to terminate Burns, a decision Harris supported.

28. Harris requested Morrell and Edward Bjorn to assist UniNet to ensure an independent investigation of Burns' claim of harassment. Such de minimis participation does not establish that SCCI controlled UniNet's employment practices or that SCCI so dominated UniNet that the two companies could be considered "one entity and thus one employer." See, e.g., Johnson, 814 F.2d at 981 (granting summary judgment for defendant employers when no evidence that parent company "excessively interfered with the business operations" of subsidiary); Harris v. Palmetto Tile, Inc., 833 F. Supp. 263, 265-66 (granting summary judgment for employers). Burns' failure to establish a single employer relationship between UniNet and SCCI mandates that the Court enter judgment for SCCI.

E. Burns Has Failed To Mitigate Her Damages

29. A Title VII plaintiff is not entitled to back pay damages if she did not exert reasonable efforts to mitigate her damages. Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1358 (4th Cir. 1995). The duty to mitigate damages requires that the claimant be reasonably diligent in seeking and accepting new

employment substantially equivalent to that from which she was discharged. Brady v. Thurston Motor Lines, Inc., 753 F.2d 1269, 1273 (4th Cir. 1995). Burns' refusal to seek employment of any kind since December 1997 is a breach of her duty to mitigate her damages. Therefore, Burns should not be entitled to any damages for back pay after December 1997.

30. A Title VII plaintiff cannot remain idle after discharge and receive back pay for that period when she was not actively seeking employment; a discharged employee must make reasonable efforts to find other suitable employment. Brady, 753 F.2d at 1273. When a discharged Title VII plaintiff subsequently finds similar employment, but voluntarily ends her employment, back pay should be decreased by the amount she would have earned had she not ended her employment. Id. Burns claims she was forced out of her job with Loudoun Computer Services in December 1997 when her request to work from home full-time was denied. Because the request was unreasonable, the termination of her job with Loudoun Computer Services was voluntary. She was employed by Loudoun Computer Services from August 1995 to December 1997. Burns' claim for back pay should, therefore, be reduced by the amount she would have earned at Loudoun Computer Services had she not voluntarily terminated her job in December 1997.

31. A Title VII plaintiff's claim for back pay should be reduced by any earnings acquired by the employee during the interim period, regardless of the type of work involved. Brady, 753 F.2d at 1274-75. Burns was employed in computer sales at Loudoun Computer Services for the period August 1995 to

December 1997 and earned a total off $146,805.84 during that period. Therefore, Burns' claim for back pay must be reduced at least by $146,805.84. Because Burns earned more in salary and commissions at Loudoun Computer Services than she did while employed at UniNet, her back pay claim is zero for the period August 1995 through December 1997.

32. A Title VII claimant must also use reasonable diligence to maintain any suitable employment which is secured after the discharge. Brady, 753 F.2d at 1277. A claimant who fails to do so in effect voluntarily removes herself from the job market and forfeits her right to back pay. Id. Burns failed to use reasonable diligence to maintain her employment with Loudoun Computer Services. Burns' request that she be permitted to work full time from home was unreasonable. As such, Burns voluntarily removed herself from the job market in December 1997, thereby waiving her right to back pay.

33. The only recognized exceptions to a claimant's duty to use reasonable diligence to maintain subsequent employment are (1) if the employer places unreasonable working conditions on the employee or (2) if the employee is earnestly searching for better employment. Brady, 753 F.2d at 1278. Neither of the exceptions applies to the present case. First, Loudoun Computer Services reasonably refused to allow Burns to work full time from her home when she was employed as a full time sales representative. Loudoun Computer Services required full time employees to work from their offices. As an employee, Burns was required to "act reasonably and responsibly in accordance with employer rules." id. at 1277. She did not. Second, Burns made

a higher income while employed by Loudoun Computer Services than she did while she was employed by UniNet. Moreover, Burns has stated that she could no longer seek employment or work after December 1997 and that her decision not to seek employment and not to work had nothing to do with searching for better employment.

34. Burns failed to satisfy her duty to mitigate her damages during the period immediately following her discharge from UniNet on March 10, 1995. A Title VII claimant must be reasonably diligent in accepting new employment substantially equivalent to that from which she was discharged. Brady, 753 F.2d at 1273, citing, Ford Motor Co. v. EEOC, 458 U.S. 219, 232 (1982). While she did pursue similar employment and attended a number of job interviews during the April to May 1995 time period, Burns unreasonably refused to accept an offer of employment from one computer sales company, CMS, and failed or refused to submit a written proposal of her required terms of employment with another computer company, Altair Associates. Such unreasonable actions constitute a failure to diligently accept substantially equivalent new employment. Therefore, Burns has waived her claim for back pay for the period April 1995 through August 1995 when she finally accepted employment with Loudoun Computer Services.

V. CONCLUSION

For the foregoing reasons, and those that may be advanced during oral argument, Defendants UniNet, Inc. and Southeastern Computer Consultants, Inc. respectfully request that their Proposed Findings of Fact and Conclusions of Law be adopted by

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the Court.

Respectfully submitted,

/s/ David J. Ervin
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 9, 1998, a true copy of the foregoing Defendants' Proposed Findings of Fact and Conclusions of Law was served upon the below listed

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/s/ David J. Ervin
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

PATRICIA B. BURNS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 98-382-A**
	)	
JOHN E. BJORN, et al.,	)	
	)	
Defendants.	)	

MOTION FOR JURY TRIAL PURSUANT TO FED R. CIV. P. 39(b)

COMES NOW, plaintiff, Patricia B. Burns, by counsel, pursuant to Fed. R. Civ. P. 39(b) and moves for the entry of an order allowing trial by jury on the issues of liability, compensatory damages and punitive damages on the following grounds:

1. On November 28, 1994 while in the employ of defendants UniNet, Inc. ("UniNet")/Southeastern Computer Consultants, Inc.("SCCI") plaintiff filed a complaint alleging sexual harassment with the U.S. Equal Opportunity Employment

Commission ("EEOC") for the for the purpose of obtaining applicable remedies available to her on account of said harassment, including, but not limited to the cessation of future harassment and the preservation of her computer sales position. Plaintiff retained the law firm of DiMuro, Ginsberg & Lieberman to assist her in the process and defendant UniNet retained the firm of Miles & Stockbridge, P.C. to assist IT in defending against the complaint.

2. On March 10, 1995, while the EEOC complaint was pending, defendants UniNet/SCCI terminated plaintiff's employment.

3. On May 19, 1995, with the assistance of the law firm of DiMuro, Ginsberg & Lieberman plaintiff filed a second complaint with the EEOC alleging that the termination of her employment was in retaliation for her filing of the EEOC complaint on November 28, 1994. Defendant UniNet retained the law firm of Miles & Stockbridge, P.C. to respond to the second EEOC complaint.

4. At all times plaintiff desired that the EEOC would accomplish an expeditious resolution of the complaints.

5. During the period from the filing of the complaints to September of 1997 the EEOC assigned and removed more than five investigators from her case as set forth in correspondence from Andrew R. Gordon, Esquire to Mr. Howard Cohn of the EEOC attached hereto as Exhibit A.

6. On or about November 7, 1997 plaintiff received notice from the EEOC that the agency declined to pursue her case further on account of the fact that its policy on processing cases of discrimination had changed to direct most of the agency's

resources to an early assessment of charges and based upon that policy the EEOC declined to further pursue investigation of her charges since it had not done so earlier.

7. In response to the notice referred to in paragraph 6 plaintiff's counsel attempted to have the determination reconsidered but was unsuccessful.

8. Upon learning that the EEOC declined to reconsider its position plaintiff and her counsel were unable to agree upon a mutually satisfactory agreement for future representation and the relationship between them terminated in mid-November of 1997.

9. A Notice of Right to Sue was issued by the EEOC to plaintiff on December 23, 1997 and received by her shortly thereafter. A copy of the Notice is attached as Exhibit B.

10. Plaintiff had difficulty in obtaining alternative counsel and finally in late December of 1997 retained the services of her present counsel, an acquaintance of many years who was then in the process of moving his law practice.

11. Prior to filing the complaint herein on March 19, 1998 plaintiff's counsel expended 7.2 hours in reviewing documents and factual information, 16.2 hours in legal research and 40.8 hours drafting the complaint. An accounting of time expended is attached hereto as Exhibit C.

12. Continuously from the time that plaintiff learned of the results of the EEOC investigation plaintiff has desired to have the factual issues existing in this cause determined by a jury.

13. Plaintiff's counsel was of the belief that a jury request had been placed upon the pleadings when filed; however,

upon the appearance of the parties at the pre-trial conference on September 17, 1998 plaintiff and her counsel where advised by the Court that no request for jury trial had been made, whereupon plaintiff's counsel advised the Court of the desire for a jury trial and his belief that the pleadings had contained a jury demand.

14. The pleadings do not contain a jury demand. The absence of the demand is the result of human error in the review of the final draft of the pleadings occasioned by the complexity of the factual allegations which the case was perceived to require and the attention to the inclusion of all of the elements peculiar to an area of law not previously undertaken by counsel at the expense of the most basic and cherished element of American jurisprudence.

15. The issues presented for factual determination do not involve complex questions of technical or scientific expertise, rather, it is anticipated that there will be sharp contrast in the facts presented by witnesses for the plaintiff and those presented by the defense. The initial factual determinations will turn upon an assessment of the credibility of the witnesses for each of the parties, a determination particularly suited for a collective assessment by a jury. Where credibility is not at issue, then the factual assessment will require a determination of the intent with which an act was done, another area of inquiry particularly suited for a jury's determination.

16. Defendants have conducted full and complete discovery. The time remaining until the scheduled trial date provides ample opportunity for the defendants to fully prepare for trial by jury and accordingly the grant of a jury trial will cause no

prejudice to defendants.

17. The grant of a jury trial at this time should allow this matter to proceed as scheduled, without delay or other imposition of adverse effect upon the Court's docket.

PATRICIA B. BURNS

By: /s/ Larry A. Pochucha
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of September 1998, I caused to be served a true copy of the foregoing Motion to the following offices as indicated below:

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Larry A. Pochucha

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

PATRICIA B. BURNS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 98-382-A**
	)	
JOHN E. BJORN, et al.,	)	
	)	
Defendants.	)	

BRIEF IN SUPPORT OF MOTION FOR JURY TRIAL PURSUANT TO FED R. CIV. P. 39(b)

On March 19, 1998 plaintiff filed her Complaint. On or about April 9, 1998 all defendants filed their Answers. The Complaint filed by plaintiff did not include a jury demand. Plaintiff has consistently desired that her case be tried to a jury and plaintiff's counsel was under the mistaken impression that the Complaint contained a jury demand until the pre-trial conference on September 17, 1998 when the Court advised that the pleadings contained no demand. Plaintiff's counsel expressed to the Court

at that time his belief that the demand appeared in the pleadings and defendants' counsel immediately assured the Court that the demand was not present. On September 17, 1998 the case was set for trial on November 24, 1998.

ARGUMENT AND LAW

Fed. R. Civ. P. 38 requires that a demand for trial by jury be filed "not later than 10 days after the service of the last pleading directed to such issue". Local Rule 38 requires that a demand for jury trial in a civil action must be in writing and filed strictly in accordance with Fed. R. Civ. P. 38. Fed. R. Civ. P. 39(b) provides that notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues. It is clear from the plain language of the statute that the decision of whether or not to grant relief is a matter addressed to the sound discretion of the trial court. Malbon v. Pennsylvania Millers Mut. Ins. Co., 636 F.2d 936, 940 (4th Cir. 1980).

Vannoy v. Cooper, 872 F. Supp. 1485 (E.D. Va. 1995) sets forth an extensive review of the law related to the consideration of a motion pursuant to Fed. R. Civ. P. 39(b). The factors which Vannoy asserts should be considered are: the four factors set forth in Malbon, 636 F.2d at 940, namely, (1) whether the issues are more appropriate for determination by a jury or a judge (i.e., factual versus legal, legal versus equitable, simple

versus complex); (2) whether permitting a jury trial would prejudice the opposing party; (3) when the motion was made (early or late in the proceedings); and (4) whether granting a jury trial would affect adversely the court's docket and the orderly administration of justice and a fifth factor, (5) the justifiability of the delay. Vannoy, 872 F. Supp. At 1489.

As stated in the accompanying motion, the complaint filed herein sets forth in detail the facts which support plaintiff's cause of action. It is alleged that John E. Bjorn, while acting in his capacity as President of UniNet, Inc. ("UniNet") pursued a course of sexually predatory conduct with at least three women including the plaintiff. It is further alleged that in his capacity as President, defendant Bjorn, manifested a sex based animus toward women in general. Defendant Bjorn denies all allegations.

The sexually predatory conduct of defendant Bjorn consisted of using his position to hire women whom he found attractive. After hire, Mr. Bjorn was extremely solicitous of such women, treating them more favorably in the work place than others and by subtle artifice attempted to draw those women into a romantic relationship with him.

In the instance of each of the three women, when it became apparent that Mr. Bjorn's advances were unwelcome, Mr. Bjorn reversed his treatment of them and pursued a course of conduct to force them to depart from the employ of UniNet. The plaintiff, Ms. Maureen Schaefer and Ms. Sue Foreman Temple

have each testified in deposition that they were subject to flirtatious behavior by Mr. Bjorn. Mr. Bjorn denies any flirtatious behavior except a single kiss with Ms. Temple.

The plaintiff and those witnesses testified that Mr. Bjorn's treatment of them changed drastically after they made it clear that they would not respond to Mr. Bjorn's flirtatious behavior. Mr. Bjorn denies any change in treatment.

Plaintiff alleges that a fourth female UniNet employee was subject to Mr. Bjorn's advances, but welcomed them. Mr. Bjorn denies that he made advances upon the fourth woman in the work place although the woman, Laura Brooks is now the current Mrs. Bjorn and holds a management position at UniNet.

Plaintiff filed her EEOC complaint on November 28, 1994. On March 9, 1995, she suffered such emotional trauma as a result of Mr. Bjorn's threats to upset her largest account, that she could not physically remain on the job, departed and left her supervisor a memorandum to that effect. When she returned on the following day, she was fired for leaving early and other unspecified failures to comply with company policies and procedures.

The question of whether Mr. Bjorn is to be believed or whether plaintiff and her witnesses are to be believed are questions of fact which the jury system is uniquely designed to resolve. Further, the circumstances surrounding Ms. Burns' termination lend themselves to discussion and the application of the diverse

backgrounds and perspectives which the collective body of a jury provides. These are but a portion of the many factual issues which must be resolved in determining whether the plaintiff was the subject of sexual harassment, discriminatory treatment and/or retaliation.

The law firm representing defendants UniNet, Inc. and Southeastern Computer Consultants, Inc. has had since November of 1994 to gather facts pertaining to plaintiff s claim since the firm was hired by UniNet, Inc. in November of 1994. The defense of defendant Bjorn who has separate counsel is not in conflict with that of the corporate defendants. No prejudice from the award of a jury trial will result to defendants.

Oral notification of plaintiff's desire for a jury trial was conveyed on September 17, 1998. Pursuant to Fed.R.Civ.P.38, plaintiff's notification was due on April 19, 1998; however, at that time plaintiff was laboring under the mistaken impression that the request had already been made. Plaintiff asserts that when considering the timing of this request, the Court should look to the passage of time from this Motion to September 17, 1998, the date of the pre-trial conference and the date on which plaintiff became aware that the complaint did not include a jury demand.

Plaintiff is unfamiliar with the internal scheduling of the Court, but assumes that a timely and favorable disposition of her motion would allow the fill to proceed as scheduled on November 24, 1998 with a jury.

The Complaint is twenty pages long and consists of eighty one paragraphs setting forth in detail the factual basis of plaintiff's claim In the Motion and Exhibits filed simultaneously herewith plaintiff's counsel represents to the Court that prior to the filing of the Complaint he expended 16.2 hours conducting legal research and another 40.8 hours drafting the Complaint. Counsel further represents to the Court that the time expended in drafting which most likely includes some additional research time was expended as a result of the complexity of the factual allegations and the need to insure that all of die elements of an area of law not previously undertaken were addressed.

Counsel does not claim illness or inexperience in this Court as justification for plaintiffs failure to assert a jury demand. It was thought that the demand had been included in the Complaint. The submission of time expended in research in advance of the filing of the complaint and drafting of the complaint itself is provided to demonstrate an absence of intentional neglect or failure to diligently pursue the matter undertaken. It is submitted that requisite advance time and effort were expended to accomplish the task in a competent matter; the requirement of the Rule is not at issue. Lack of effort was not the cause of the omission. The frailty of human nature is neither an excuse nor a refuge, but the only accounting available.

In General Tire and Rubber Company v. Watkins, 331 Fed 2d 192, 197 (1964) the Court affirmed a denial of the motion pursuant to Rule 39 (b) stating:

We recognize the principle as often enunciated by the courts, that there may be exceptional circumstances present which would appear to compel the Court in the exercise of its discussion to order a jury trial.

In the case under consideration, the plaintiff was required to wait nearly three years for the Equal Employment Opportunity Commission to tell her that because the agency had waited so long to consider her case that the guidelines requiring it to assess cases early required termination of further consideration of her complaint.

The executive branch of her government having delayed and denied resolution of her claims, the plaintiff then pursued a forum where a long awaited resolution would be provided by her peers. Absent a favorable ruling upon her motion, such a resolution can never occur. The right to trial by jury is considered to be the great equalizer by much of the population. On the another hand, a small portion believes that the common sense of the general populous is inferior to consideration of facts by a highly educated and specialized expert. The integrity of the constitutional right to trial by jury remains intact at this time, subject only to procedural rules enacted for the purpose the orderly administration of justice

The allowance of a trial by jury in this instance will not constitute a disruption of that orderly process of justice but will demonstrate the application of reasoned judgment upon an

individual basis. Such a consideration of the totality of the circumstances presented which weighs the rights of the individual against the legitimate needs of the government is the hallmark of our system of justice.

CONCLUSION

In accordance with the foregoing authority and facts, it is respectfully requested that the Court grant plaintiff s motion for a trial by jury.

PATRICIA B. BURNS

By: /s/ Larry A. Pochucha

Attorney for Plaintiff
Larry A. Pochucha, Esquire
VSB No. 15674
COATES & DAVENPORT
5206 Markel Rd., #200
P.O. Box 11787
Richmond, VA 23230
(804) 285-7000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of September 1998, I caused to be served a true copy of the foregoing Motion to the following offices as indicated below:

Janis Orfe, Esquire
THE LAW OFFICES OF
JANIS ORFE, P.C.
4010 University Drive, Suite 102
Fairfax, Virginia 22030
(703) 218-1000

(via telefax and first class postage prepaid mail)

David J. Ervin, Esquire
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(703) 903-9000

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Stephen M. Silvestri, Esquire
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(via telefax and first class postage prepaid mail)

/s/ Larry A. Pochucha
Larry A. Pochucha

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

PATRICIA B. BURNS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 98-382-A**
	)	
JOHN E. BJORN, et al.,	)	
	)	
Defendants.	)	

ORDER

The matter comes before the Court on defendants' motion for summary judgment, defendants' motion to strike plaintiff's affidavit, and plaintiff's motion for jury trial.

For the reasons stated from the Bench, it is hereby **ORDERED** that

(i) plaintiff's motion for jury trial is **DENIED**;

(ii) defendants' motion to strike plaintiffs affidavit is **DENIED**; and

(iii) defendants' motion for summary judgment is **GRANTED IN PART** and **DENIED IN PART**. Specifically, the motion is **GRANTED** as to Count III: Sex Discrimination, and Count III **DISMISSED** with prejudice. The motion is **DENIED** in all other respects.

It is further **ORDERED** that counsel **are** to inform the Court by 5 P.M., Monday, November 2, 1998, if the parties are interested in mediation facilitated by a magistrate judge.

The Clerk is directed to send a copy of this Order to all counsel of record.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
October 30, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

PATRICIA B. BURNS,
Plaintiff,

v. **Civil Action No. 98-382-A**

JOHN E. BJORN, UNINET, INC.; and SOUTHEASTERN COMPUTER CONSULTANTS, INC.,
Defendants.

REPORTER'S TRANSCRIPT

HEARING ON MOTIONS

Thursday, October 29, 1998

BEFORE: THE HONORABLE T.S. ELLIS, III
Presiding

APPEARANCES: COATES & DAVENPORT
BY: LARRY ARTHUR POCHUCHA, ESQ.
5206 Markel Road
Richmond, VA 23230

For the Plaintiff

MICHAEL A. RODRIQUEZ, RPR/CM/RMR
Official Court Reporter
USDC, Eastern District of Virginia
Alexandria Division

ATTORNEY SILVESTRI: Yes, that's correct. But her argument is different, your Honor.

THE COURT: All right. All right, thank you, Mr. Silvestri.

ATTORNEY SILVESTRI: Thank you, Judge.

RULING BY THE COURT

THE COURT: There are two motions that I'll deal with to begin with.

The first is a motion to strike the affidavit, citing the Green opinion that I wrote.

That motion is denied. I am not persuaded that the contradiction is of the same nature, either that one or the one about abiding by policies, and "I had a tough time accepting management decisions," and the like.

However, at some later proceeding the defendant can certainly -- defendants can certainly show this to impeach any testimony given by the plaintiff. So the motion to strike the affidavit is granted -- denied, rather.

The motion for a jury trial is denied.

I have reviewed the motion and the supporting memorandum and the opposing memorandum. Cited by the plaintiff is an Eastern District decision which-- cited five factors for the Court to consider in exercising, its discretion.

That shouldn't be erroneously construed to mean that if you apply those factors and they tend to weigh generally one way or the other, that the failure to grant a jury is an abuse of discretion. They are merely factors to take into account.

The one factor that is missing from that list -- because I don't believe it's inclusive -- is the integrity of the rules. The rules say "X," they don't say "X, but only X if these five factors are not met."

So, while some of the factors might support the exercise of discretion to grant a jury in this case, such as the fact that it's a garden variety case and it is something a jury could hear, and whether or not there is prejudice or not is probably unlikely, but, in the Court's view, it has rules set up for the administration of its docket which it follows, and it makes decisions based on counsel complying with the Rules of Civil Procedure, and this docket proceeds very briskly in a very orderly manner, and it requires that counsel pay attention to the rules and abide by the rules.

So the motion for a jury pursuant to 39(b) is denied.

Now we come to the motion for summary judgment.

In essence, the Court grants the motion in

CERTIFICATE OF REPORTER

I, MICHAEL A. RODRIQUEZ, an Official Court Reporter for the United States District Court, Eastern District of Virginia, Alexandria Division, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had upon the hearing on motions in the case of PATRICIA B. BURNS v. JOHN E. BJORN, et al.

I further certify that I was authorized and did report by stenotype the proceedings in said hearing on motions, and that the foregoing pages, numbered 1 to 84, inclusive, constitute the official transcript of said proceedings as taken from my machine shorthand notes.

IN WITNESS WHEREOF, I have hereto subscribed

my name this 30th day of December, 1998.

/s/ Michael A. Rodriquez

Michael A. Rodriquez, RPR/CM/RMR
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION
----------x

PATRICIA B. BURNS,
Plaintiff,

-vs- Case No. 98-382-A
UNINET, INC.,
and SOUTHEASTERN COMPUTER
CONSULTANTS, INC.,
Defendants.
---------- x

Monday, December 7, 1998
McLean, Virginia
De Bene Esse Deposition of
CHARLES TITUS, M,D,
called for examination by counsel for the Plaintiff, pursuant to notice, held at the offices of Miles & Stockbridge, 1751 Pinnacle Drive, Suite 500, McLean, Virginia, beginning at 3:00 P.M., before Devy Khou, RPR, a notary public in and for the Commonwealth of Virginia, when were present on behalf of the respective parties:

25

the defense witnesses.

DIRECT EXAMINATION

BY MR. POCHUCHA:

Q. Dr. Titus, would you state your full name for the record?

A. Charles C. Titus.

Q. Would you describe for the court your educational background, sir?

A. I went to medical school at Case Western Reserve University in Cleveland, Ohio, graduating in 1960. I did an internship in internal medicine at the University of Virginia Hospital, 1960 to '61; and my training in psychiatry, my psychiatric residency was at the University of Colorado Medical Center 1961 to '64.

Following that, I was on the faculty at the University of Colorado Medical Center, Department of Psychiatry for a year as an instructor.

After that, I went into private practice in Denver.

Q. Private practice as a psychiatrist?

A. Yes.

Q. And do you hold any certifications or memberships related to your profession?

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A. I'm board certified in psychiatry by the American Board of Psychiatry and Neurology. I'm a member of the American Psychiatric Association, the Washington Psychiatric Society and Virginia Medical Society -- Medical Society of Virginia.

Q. What's the year in which you were board certified?

A. 1970.

Q. Would you describe your practice in the field of psychiatry since the completion of your education?

A. The bulk of my practice has been in solo private practice consisting mostly of psychotherapy plus psychopharmacology for my patients. I have held, from time to time, some part-time jobs as a psychiatrist, One was at the hospital where I first practiced psychiatry in Denver, Bethesda Hospital. Another was at the Veterans Administration Hospital in Denver, I've also worked at the Northwest Community Mental Health Center in Reston, Virginia,, on two different occasions, that is, two different blocks of time, one from 1980 to about 1985 or '6 and then

approximately 1989 or 190 to the present,

Q. And in each of those positions, you were

service her account.

Q. And what,, if anything, did you do as result of that meeting with regard to her therapy or continued welfare?

A. We continued the Amitriptyline and the Xanax.

Q. How would you describe Ms. Burns condition at that point from a medical standpoint?

A. Well, diagnostically, she would be called adjustment disorder, at that point severe, barely able to function. Her ability to concentrate and focus was poor. She is extremely anxious.

When she said, "I don't know how I'm hanging in, continuing to work," she very well described how desperate she felt,

Q. Did you have occasion to see her again at a time when UniNet was discussed?

A. Yes, She came in in March, March 14th, 1995, and her first statement was that she had been fired which was a major surprise to her because she had had a great review the week before. She said, after the review, they had sabotaged a couple of her accounts, and she mentioned an account at

Loudoun Hospital and then complained that they took control of her accounts. She became panicked and

had to leave work at noon on one of the days when this was happening. She had to leave work at noon. And she was fired the next day.

Q. What do you mean -- strike that,

Did you inquire of her as to what she meant when she said she had become panicked?

MR. SILVESTRI: Objection to the form of the question.

THE WITNESS: Well, I knew what she meant. She knows what the symptoms of a panic attack are. She didn't have to explain it to me, That includes extreme fear, rapid heartbeat, a conviction that you're going to either pass out or die. It's the most extreme form of anxiety that we know.

During that same visit, towards the end, I essentially said to her that this was bound to happen, that she had experienced other abusive relationships and that they all ended sooner or later, But then I told her that, despite her anxiety talking about this situation, that she needed to talk about it in order to get rid of the

extreme anxiety she was having.

BY MR. POCHUCHA:

Q. And can you describe her condition on that